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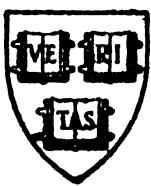
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9	549
s 75a 605	s 78a 35
31	554
s 80a 640	s 78a 223
35	564
s 79a 303	s 81a 556
85a 1473	575
85a 2472	s 81a 678
64	582
s 74a 326	s 77a 59
111	614
s 79a 245	s 75a 483
116	622
s 81a 368	s 80a 358
120	626
s 79a 527	s 71a 75
132	
s 79a 661	
136	
s 182	252
f 181	194
f 182	184
188	1894
188	1878
151	
s 81a 384	
158	
s 80a 549	
162	
182	311
173	
s 81a 547	
199	
s 69a 566	
206	
s 81a 389	
210	
s 81a 637	
237	
s 80a 128	
279	
s 80a 150	
323	
s 80a 515	
334	
s 82a 85	
340	
s 80a 313	
85a 1596	
347	
s 80a 344	
350	
s 78a 611	
358	
s 82a 298	
366	
s 80a 828	
393	
s 77a 424	
411	
s 79a 651	
440	
s 80a 283	
448	
s 81a 62	
456	
s 79a 657	
460	
s 82a 570	
495	
s 81a 279	

ABBREVIATIONS USED—  
 A, B, C means two or more cases on page; C, criticised; d, distinguished; e, explained; f, followed; L, limited; m, modified; o, overruled; p, parallel case; q, qualified; s, same case; w, wrong citation or application; small figure indicate the section to which reference applies; \* indicates reference is to a point not mentioned in syllabus.







N<sup>25</sup>  
SK.

# REPORTS

OF

## CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

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VOLUME 181.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN OCTOBER,  
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ISAAC NEWTON PHILLIPS,  
REPORTER.

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# TABLE OF CASES

REPORTED IN THIS VOLUME.

## A PAGE.

Abbott <i>ads.</i> Carterville Coal	
Co. ....	495
Adams <i>v.</i> Adams. ....	210
Adamski <i>v.</i> Wieczorek....	361
Akin <i>ads.</i> Hogan. ....	448
Alton, City of, <i>v.</i> Fishback..	396
Andrews & Co. <i>ads.</i> Siegel..	350

## B

Behrens <i>ads.</i> Franklin Print-	
ing and Publishing Co. ....	340
Bellefontaine Improvement	
Co. <i>v.</i> Niedringhaus. ....	426
Bible <i>ada.</i> Tracy. ....	331
Blair <i>v.</i> People <i>ex rel.</i> ....	460
Bock <i>ads.</i> Kuglin. ....	165
Boddie <i>ads.</i> Brewer & Hof-	
mann Brewing Co. ....	622
Bode <i>ads.</i> Saeger. ....	514
Bogardus <i>v.</i> Moses. ....	554
Bokamp <i>ads.</i> Consolidated	
Coal Co. ....	9
Botkin <i>ads.</i> Robison. ....	182
Bowman <i>ads.</i> People <i>ex rel.</i> ..	421
Brewer & Hofmann Brewing	
Co. <i>v.</i> Boddie .....	622

## C

Callender <i>ads.</i> Gray. ....	173
Carterville Coal Co. <i>v.</i> Ab-	
bott. ....	495
Casey <i>v.</i> Kimmel. ....	154
Catholic Order of Foresters	
<i>v.</i> Fitz. ....	206
Centralia, City of, <i>v.</i> Nagele.	
151	

Cheney <i>v.</i> Cross. ....	31
Chicago, Burl. & Quincy R.R.	
Co. <i>ads.</i> Chicago Gen. Ry. Co.	605
Chicago, City of, <i>ads.</i> Cruick-	
shank. ....	415
Chicago, City of, <i>ads.</i> Jarrett	
242	
Chicago, City of, <i>ads.</i> Penn-	
sylvania Co. ....	289
Chicago & Eastern Illinois	
R. R. Co. <i>ads.</i> Overtoom...	323
Chicago General Ry. Co. <i>v.</i>	
C., B. & Q. R. R. Co. ....	605
Chicago, Wilmington & Ver-	
milion Coal Co. <i>v.</i> People. ....	270
Clark & Co. <i>ads.</i> Kent. ....	237
Colgate <i>ads.</i> Trevor. ....	129
Comrs. of Wild Cat Drainage	
District <i>ads.</i> People <i>ex rel.</i> ..	177
Commonwealth Loan and	
Building Ass. <i>ads.</i> Thornton	456
Consolidated Coal Co. <i>v.</i> Bo-	
kamp. ....	9
Crosby <i>ads.</i> Grand Pass Shoot-	
ing Club. ....	266
Cross <i>ads.</i> Cheney. ....	31
Cruickshank <i>v.</i> City of Chi-	
cago. ....	415
Cummings <i>v.</i> West Chicago	
Park Comrs. ....	136
D	
Davis <i>ads.</i> Sanford. ....	570
Day, <i>In re</i> . ....	73
Dixon, City of, <i>v.</i> Scott. ....	116
Duncan <i>ads.</i> Martin. ....	120

**E** PAGE.

English *v.* Landon ..... 614  
 Erickson *ads.* Kewanee Boiler Co ..... 549  
 Ervington *v.* People ..... 408

**F**

Fidelity and Casualty Co. *v.* Sittig ..... 111  
 Field *v.* Village of Western Springs ..... 186  
 Finch *v.* Galigher ..... 625  
 Fishback *ads.* City of Alton ..... 396  
 Fitz *ads.* Catholic Order of Foresters. .... 206  
 Fitzgerald *v.* Lorenz ..... 411  
 Fort Dearborn Nat. Bank *ads.* Wyman ..... 279  
 Franklin Printing and Publishing Co. *v.* Behrens ..... 340

**G**

Gadwood *v.* Kerr ..... 162  
 Galesburg and Great Eastern R. R. Co. *v.* Milroy ..... 243  
 Galigher *ads.* Finch ..... 625  
 Gallatin, County of, *ads.* Village of Ridgway ..... 521  
 Gibson *v.* Nelson ..... 122  
 Glos *v.* Huey ..... 149  
 Glos *ads.* Roach ..... 440  
 Gordon *v.* Winston ..... 338  
 Graham *ads.* Milwaukee Mechanics' Ins. Co ..... 158  
 Graham *v.* People ..... 477  
 Grand Pass Shooting Club *v.* Crosby ..... 266  
 Gray *v.* Callender ..... 173  
 Gunton *v.* Hughes ..... 132

**H**

Halloway *v.* People ..... 544  
 Hammond, Village of, *v.* Leavitt ..... 416  
 Hawes *ads.* Hunt ..... 343  
 Heenan & Co. *ads.* Niagara Fire Ins. Co ..... 575  
 Hogan *v.* Akin ..... 448

Home Savings Bank *ads.* National Home Building Ass. ..... 35  
 Huey *ads.* Glos ..... 149  
 Hughes *ads.* Gunton ..... 132  
 Hunt *v.* Hawes ..... 343  
 Hunt *v.* Sain ..... 372

**I**

Illinois State Board of Health *v.* People *ex rel.* ..... 512  
 Iroquois Furnace Co. *v.* Wilkinson Manf. Co. ..... 582

**J**

Jarrett *v.* City of Chicago ..... 242

**K**

Kellogg *v.* Peddicord ..... 22  
 Kelly *v.* Parker ..... 49  
 Kennett *ads.* Kruse ..... 199  
 Kent *v.* Clark & Co. ..... 237  
 Kerr *ads.* Gadwood ..... 162  
 Kewanee Boiler Co. *v.* Erickson ..... 549  
 Kimmel *ads.* Casey ..... 154  
 Knapp, Stout & Co. Company *v.* Ross ..... 392  
 Knorst *v.* Knorst ..... 347  
 Kruse *v.* Kennett ..... 199  
 Kuglin *v.* Bock ..... 165

**L**

Landon *ads.* English ..... 614  
 Langlois *v.* McCullom ..... 195  
 Lawrence *v.* Lawrence ..... 248  
 Leavitt *ads.* Village of Hammond ..... 416  
 Lischinski *ads.* Seaverns ..... 358  
 Lorenz *ads.* Fitzgerald ..... 411  
 Lowmaster *ads.* Wilson ..... 170

**M**

Mack *v.* McIntosh ..... 633  
 Martin *v.* Duncan ..... 120  
 McCullom *ads.* Langlois ..... 195  
 McElvain *ads.* Travers ..... 382  
 McIntosh *ads.* Mack ..... 633

PAGE.	PAGE.	
Meadowcroft <i>v.</i> Winnebago County..... 504	People <i>ex rel.</i> <i>v.</i> Schintz..... 574	
Milroy <i>ads.</i> Galesburg & Great Eastern R. R. Co. .... 243	People <i>ex rel.</i> <i>v.</i> Wild Cat Drainage District,..... 177	
Milwaukee Mechanics' Ins. Co. <i>v.</i> Graham..... 158	Petefish <i>ads.</i> Trustees of Schools..... 255	
Modern Woodmen of America <i>ads.</i> Park. .... 214	Prescott <i>v.</i> West Chicago Park Comrs. .... 194	
Morrow <i>ads.</i> People <i>ex rel.</i> ... 315	<b>R</b>	
Morse <i>ads.</i> Rochester Loan and Banking Co. .... 64	Raftree <i>ads.</i> Wright..... 464	
Moses <i>ads.</i> Bogardus..... 554	Reddick <i>ads.</i> People <i>ex rel.</i> ... 334	
<b>N</b>		
Nagele <i>ads.</i> City of Centralia 151	Reuter <i>v.</i> Stuckart..... 529	
National Home Building Ass. <i>v.</i> Home Savings Bank.... 35	Rexroat <i>v.</i> Vaughn..... 167	
Nelson <i>ads.</i> Gibson..... 122	Ridgway, Village of, <i>v.</i> County of Gallatin..... 521	
Niagara Fire Ins. Co. <i>v.</i> Heenan & Co. .... 575	Roach <i>v.</i> Glos..... 440	
Niedringhaus <i>ads.</i> Bellefontaine Improvement Co.... 426	Robison <i>v.</i> Botkin..... 182	
Nieman <i>v.</i> Schnitker..... 400	Rochester Loan and Banking Co. <i>v.</i> Morse ..... 64	
<b>O</b>		
Overtoom <i>v.</i> Chicago & Eastern Illinois R. R. Co..... 323	Ross <i>ads.</i> Knapp, Stout & Co. Company ..... 392	
<b>P</b>		
Park <i>v.</i> Modern Woodmen of America..... 214	<b>S</b>	
Parker <i>ads.</i> Kelly ..... 49	Saeger <i>v.</i> Bode ..... 314	
Peddicord <i>ads.</i> Kellogg ..... 22	Sain <i>ads.</i> Hunt..... 372	
Pennsylvania Co. <i>v.</i> City of Chicago ..... 289	Sanford <i>v.</i> Davis ..... 570	
People <i>ads.</i> Chicago, Wilmington and Vermilion Coal Co. 270	Schintz <i>ads.</i> People <i>ex rel.</i> ... 574	
People <i>ex rel.</i> <i>ads.</i> Blair..... 460	Schnitker <i>ads.</i> Nieman ..... 400	
People <i>ex rel.</i> <i>v.</i> Bowman.... 421	Scott <i>ads.</i> City of Dixon.... 116	
People <i>ads.</i> Ervington..... 408	Seavers <i>v.</i> Lischinski..... 358	
People <i>ads.</i> Graham ..... 477	Siegel <i>v.</i> Andrews & Co .... 350	
People <i>ads.</i> Halloway..... 544	Sittig <i>ads.</i> Fidelity and Casualty Co. .... 111	
People <i>ex rel.</i> <i>ads.</i> Illinois State Board of Health.... 512	Small <i>ads.</i> Watson Cut Stone Co ..... 366	
People <i>ex rel.</i> <i>v.</i> Morrow .... 315	Smith <i>ads.</i> Yockey..... 564	
People <i>ex rel.</i> <i>v.</i> Reddick.... 334	Stuckart <i>ads.</i> Reuter..... 529	

**T**

Thornton <i>v.</i> Commonwealth Loan and Building Ass.... 456
Tracy <i>v.</i> Bible..... 331
Travers <i>v.</i> McElvain..... 382
Trevor <i>v.</i> Colgate. .... 129
Trustees of Schools <i>v.</i> Pete-fish..... 255

V	PAGE.	PAGE.	
Vaughn <i>ads.</i> Rexroat.....	167	Wild Cat Drainage District <i>ads.</i> People <i>ex rel.</i> .....	177
<b>W</b>			
Walker <i>v.</i> Walker.....	260	Wilkin Manf. Co. <i>ads.</i> Iro-	582
Watson Cut Stone Co. <i>v.</i> Small.....	366	quois Furnace Co.....	170
West Chicago Park Comrs. <i>ads.</i> Cummings.....	136	Wilson <i>v.</i> Lowmaster.....	504
West Chicago Park Comrs. <i>ads.</i> Prescott.....	194	Winnebago County <i>ads.</i> Meadowcroft.....	338
Western Springs, Village of, <i>ads.</i> Field.....	186	Wright <i>v.</i> Raftree .....	464
Wieczorek <i>v.</i> Adamski.....	361	Wyman <i>v.</i> Fort Dearborn Nat. Bank.....	279
<b>Y</b>			
Yockey <i>v.</i> Smith.....			564

## CASES

ARGUED AND DETERMINED

IN THE

# SUPREME COURT OF ILLINOIS.

THE CONSOLIDATED COAL COMPANY OF ST. LOUIS

v.  
FRANK BOKAMP.

*Opinion filed June 21, 1899—Rehearing denied October 6, 1899.*

181	9
94a	5
94a	81
181	9
100a	188
181	9
198	296

1. **PLEADING**—when objection to declaration is waived by pleading over. An objection that the declaration of a servant injured by reason of the defective condition of the place where he was working, failed to allege that he relied upon the master's promise to repair and that a reasonable time had elapsed after such promise, is cured, after verdict, by pleading over.

2. **NEGLIGENCE**—when question of contributory negligence is for jury. The question whether the acts of the plaintiff contributed to his injury, so as to bar recovery, is for the determination of the jury, where the minds of fair men would differ in their conclusions.

3. **INSTRUCTIONS**—when omission from instruction of element of recovery is not ground for reversal. That an instruction for plaintiff, in a suit to recover for an injury received while working after a promise to repair defects, fails, in summing up the essentials of recovery, to negative the idea that the danger was so imminent that ordinarily prudent men would not incur it, is not ground for reversal, where the other instructions fully define due care and require the plaintiff to be in the exercise thereof.

4. SAME—*when instruction on contributory negligence is properly refused.* An instruction that plaintiff could not recover if he "did any careless or negligent act which materially contributed to his injury," is properly refused, as he might, under such circumstances, be entitled to recover if his acts or omissions were not the proximate cause of the injury.

5. MINES—*statute concerning props has not superseded common law obligations of master to servant.* The statute requiring mine owners to keep a supply of props and timbers on hand, "so that the workmen may at all times be able to properly secure said workings for their own safety," does not supersede the common law obligation of the mine owner with respect to the roof of the mine, so as to relieve him from further responsibility after complying with the statute.

*Consolidated Coal Co. v. Bokamp*, 75 Ill. App. 605, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Macoupin county; the Hon. ROBERT B. SHIRLEY, Judge, presiding.

CHARLES W. THOMAS, and FRANK W. BURTON, for appellant.

PEEBLES, KEEFE & PEEBLES, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

The statement of facts by the Appellate Court is as follows:

"This suit was commenced by appellee to recover for injuries sustained by him while working as a driver in appellant's coal mine. The mine is located at Gillespie, in Macoupin county. At the time of the injury complained of it had a main entry running north from the bottom of the shaft, from the east wall of which various side entries had been driven. The side entries ran east, at right angles with the main entry. The injury took place at the ninth east entry. Appellee had been in the employ of appellant as a driver in this mine for about three years. It was his duty to drive a mule hauling empty cars from the

shaft bottom to the working places, and, when loaded, back to the shaft bottom. The ninth east entry was about eight feet wide and six feet high. It extended about a quarter of a mile from the main entry. The coal was being mined from rooms adjoining it by a machine with a capacity of forty-eight boxes a day. Near the east end of the east entry was what was called a 'back entry,' running in a north-easterly direction from the ninth east entry. At this point there was a switch. In doing his work it was the practice of appellee to couple onto four empty boxes on a switch in the main entry, haul them out that entry to the ninth east, thence out the ninth east to the back entry, there leave two of them on the west side of the switch while he went on down the entry to the place where the coal was being mined and loaded, exchange the two empties taken with him for two loaded boxes, haul the two loaded ones up to the east side of the switch, stop them, then take his other two empties into the back entry, exchange them for two loaded boxes and bring them out the back entry to the switch. As the mule pulling the cars approached the turn at the switch, appellee would step from his seat on the front box, go across to the ninth east track and start the two loaded boxes which he had left standing there. There was a down grade from that point west. After starting the two loads he would follow after the mule, moving slowly with the other two, and the two started would follow him. Some twenty feet from the point where he would start the cars was a wide place in the entry on the north side of the track. At this point he would pass around to the right of the cars in front of him and mount the seat which he had left when he went to start the other cars. He would then drive down the grade and up the one that was further on. After reaching the top of the second grade he would detach from the two first and return for the two cars started, which he would haul up to the others, couple on and proceed with the four toward the shaft.

Some three or four days before he was hurt he noticed that two cross-beams supporting a portion of the roof of the ninth east, a short distance west of the switch and at the wide place mentioned, were cracked, and sagged down in the middle. On the Saturday before he was injured on Tuesday, he claims that he notified his pit-boss, C. J. Ramsey, of the dangerous condition of the roof at that place, and that Ramsey promised to have it repaired. On the day that he was injured he had made several trips, finding the ground underneath the sagging cross-beams clear and all right. On the trip when he met his accident he had taken his last two empties into the back entry and returned with two loads. He had started the two loads which had been left to the east side of the switch and had walked to the wide place. While trying to mount his seat on the front car, as was his wont, his right foot was caught on some slack and top coal, as he contends, which had been precipitated from the defective roof above since the time he passed with the empties, and he was thrown forward and jerked off by the timber which supported one end of the broken cross-beams. He was hurled in front of the first car, which so crushed and mangled him as to paralyze both lower limbs and render the amputation of one of them necessary."

A trial resulted in a verdict in favor of the appellee for \$5150, which, on appeal, was affirmed by the Appellate Court for the Third District.

The declaration consisted of five counts, only two of which the court permitted to go to the jury. In one count the negligence charged is, that the appellant allowed certain props, cross-beams and supports which held the roof of the mine, to become cracked, broken and unsafe, and so to remain after promising to repair the same, whereby they gave way and precipitated large quantities of coal and slack from the roof, which collided with the cars and caused the injury. In the other the negligence charged is the failure of appellant to furnish ap-

pelée a reasonably safe place to work in, in allowing the track and place where he was wont to work and haul cars to be obstructed with coal and slack, props and other material, so near the track as to injure him in the use of it, and in allowing the supports for the roof to become broken, whereby coal and slack were precipitated from the roof, causing the injury.

Appellee contends that he was directed by the mine manager to haul the cars in the manner he did, and that in order to haul forty-eight cars a day, as was required of him, it was necessary for him to perform his duty in that manner. The testimony of appellant tends strongly to show that the appellee was not injured at the place alleged to have been defective, but at a point fifty feet distant; that the defective timbers complained of were not supports for the roof, but only to hook strings on; that no complaint or notice had been made or given of any defect by either appellee or Dickerson, the night mine inspector, and that no report was made of any defect, as shown by the book in which it was the duty of the inspector to make his report. Concerning the above points of controversy there was a sharp conflict.

Appellant made its motion to take the case from the jury at the close of appellee's evidence, which motion was afterwards renewed at the close of all the evidence, and it contended that the testimony showed that at the time of the injury the appellee was not in the exercise of due care and caution for his own safety, and that the court should so find that fact as a matter of law. Three witnesses, men working in the mine shortly before appellee was injured, named Brown, Casky and Opie, testified that they warned the appellee that he was running a risk in handling the cars in the way he did. There is no testimony showing the speed at which these cars were going when appellee attempted to mount his seat on the front car, nor does the evidence indicate that the speed was such as made it a matter of imminent hazard so to do.

After verdict appellant filed its motion in arrest of judgment, for the reason set forth that neither of the counts which the court allowed to go to the jury was sufficient to support the same. The errors assigned in the Appellate Court were in denying the motion for arrest and in entering judgment on the verdict. The errors here assigned are, the Appellate Court erred in permitting judgment and in not reversing and remanding the cause. The points relied upon by appellant we shall consider here in the order named in its brief.

It is contended that the declaration was defective; that it is not supported by the testimony; that there is no direct averment of the promise by the appellant, through its manager, to repair the alleged defect, or notice of it; that there is no allegation that a reasonable time had elapsed after the promise to repair the supposed defect, and no averment that appellee relied upon the promise and thereby subjected himself to the danger. The allegations in the first count of plaintiff's declaration which was allowed to go to the jury are, after setting forth the nature of his employment in the mine, that the defendant permitted certain supports which held up the roof along the track and prevented clods, coal and other material from falling upon and obstructing the same, to become cracked, broken and unsafe, and to so remain after promise of the defendant to the plaintiff to fix and make safe said props, whereby the said props, cross-beams and supports broke down under the pressure of said roof and obstructed the said track, so that said cars and boxes so hauled and conducted along said track by the plaintiff, he being in the exercise of due care and caution for his own safety, collided with and struck said obstruction, throwing the plaintiff across the track, whereby the injury resulted. It will be seen that from this declaration the appellant had notice of the points relied on, viz., notice of the defect and that such defect caused the injury, and that the plaintiff was in the exercise of due care and

caution for his own safety. This, so far as stating a cause of action, is sufficient, and while on special demur-  
rer the declaration might have been objectionable, on the grounds that it failed to allege that the appellee relied upon the promise to repair, and that a reasonable time had elapsed after the promise to repair the supposed defect, the objection after verdict is cured. *Chicago, Burlington and Quincy Railroad Co. v. Warner*, 108 Ill. 538; *Chicago, Burlington and Quincy Railroad Co. v. Harwood*, 90 id. 425; *Chicago and Alton Railroad Co. v. Clausen*, 173 id. 100.

Appellant contends that the evidence in this case fails to show that the plaintiff was in the exercise of due care and caution; that it appears that other witnesses warned him that the manner in which he hauled the coal was dangerous; that his getting on the front moving car, with the other cars following behind him detached from the two he was driving, was negligence, and that we should pronounce it such as a matter of law. We have held that it is not negligence *per se* to alight from or board a moving street car propelled by horse or electric power, (*Cicero and Proviso Street Railway Co. v. Meixner*, 160 Ill. 320,) and we cannot say that the trial court would have been justified in holding that the acts of the plaintiff contributed to this injury so as to bar a recovery, it being a question upon which the minds of fair men would differ. It was a question of fact for the jury.

It is contended that because the declaration fails to state that reasonable time had elapsed after notice to the defendant in which to repair and that appellee relied upon the promise to repair, the court erred in giving the first instruction to the jury. This instruction embodied all the elements necessary to be proved in the case in order to entitle appellee to recover, viz., its failure to repair within a reasonable time; that the promise to repair by the appellant was relied on by the appellee; that such defect was the cause of the injury, and that the appellee was at the time in the exercise of reasonable care for his own safety.

The objection to the declaration was waived by pleading over, and the instruction correctly stated the law.

It is also contended by appellant that the instruction is objectionable in this: that the failure to repair referred to was after a reasonable time had elapsed after it had notice of the defect, whereas it should have been a reasonable time after the promise of appellant to repair. Be this as it may, we fail to see how in any way appellant could have been injured or the jury misled by the instruction. The notice, if given, and the promise to repair, were contemporaneous, and these questions are settled by the trial and Appellate Courts.

It is insisted the instruction was also erroneous in withdrawing from the jury the question of the nature of the defect, and thereby absolving the jury from any consideration of the question whether the plaintiff was negligent in continuing at such dangerous work, and in failing to tell the jury that if the danger was apparent and imminent he would not have been justified in continuing at his employment notwithstanding the promise of appellant. It is true the law is that a promise to repair does not authorize a person to encounter a great and imminent peril, and the jury were told that before the plaintiff could recover he must have been in the exercise of due care and caution on his part for his own safety. This was reiterated in the instructions given for the defendant. Due care and caution was defined in defendant's fourth instruction, and defendant's fifth instruction told the jury that the care which "the law requires of any person for his own safety increases with the known dangers to which the person is exposed, and if the jury believe, from the evidence, that the primary cause of the plaintiff's injury was the danger or hazard of which he had notice, then the law will require of the plaintiff the exercise of that degree of care for his own safety commensurate with the danger or hazard to which he was exposed." There was no inconsistency between this instruction and

the other instructions offered, and the jury were told by the series that the plaintiff must have been exercising such care and caution for his own safety as a reasonably prudent man under like circumstances would have exercised, and that he could not assume the hazard of an imminent danger without absolving the defendant from liability for any resulting injury.

Complaint is made that the court erred in refusing to give instruction 21 offered by appellant, to the effect that "if the jury believe, from the evidence, that plaintiff did any careless or negligent act which materially contributed to his injury he cannot recover in this case." The substance of this instruction was embodied in instructions theretofore given. It cannot be held that every negligent act of which the plaintiff might have been guilty would bar a cause of action in his behalf. The negligence of defendant charged in the declaration was in failing to keep the roof, after notice, in such condition that coal and other substance should not fall, so as to render the work of the plaintiff dangerous. Any negligence of the plaintiff in attempting to carry more cars than might possibly be safe could not in any manner have been a part of or connected with the falling of the roof in consequence of a failure on the part of the defendant to sufficiently secure it and prevent its falling. No negligence of the plaintiff is claimed on the part of the appellant to have existed other than that he sought to carry more cars than was necessary or than was safe, or that he continued to work in the mine after notice of the danger that might exist from the roof, consequent on the timbers being pressed down at the point mentioned in the evidence. We have already disposed of the question as to whether there was negligence on the part of the plaintiff in continuing to work after he had given notice to the mine manager. It would be a reflection on the intelligence of the court to ask it to consider that the manner of hauling cars in an entry in a coal mine was contribu-

tory to a danger from the falling of a roof. The only possible connection between negligence on the part of the plaintiff, aside from these questions, that could exist, arises from the inquiry as to whether the plaintiff, in carrying a number of cars in the manner he had theretofore been doing over the track in the mine entries, was negligent. The defendant in the trial court contended that plaintiff was negligent in hauling the number of cars he did on his trips, in his manner of starting other cars theretofore hauled to the shaft, and in seeking to mount his car propelled by the mule which drew the same and over which the plaintiff had control, and that the evidence is seriously conflicting as to the time at which the falling of the roof occurred on which the plaintiff stumbled.

Instruction No. 21 offered by appellant was to the effect that "if the jury believe, from the evidence, that plaintiff did any careless or negligent act which materially contributed to his injury he cannot recover in this case." The substance of it is contained in the instruction above mentioned and others. It might be that plaintiff failed to do some act or was guilty of some careless or negligent act which contributed to his injury, yet which was not the proximate cause of the injury, and still be entitled to recover.

By the twentieth instruction asked by appellant and refused, the jury were told that if plaintiff ran in front of the coal cars while they were going down grade of their own weight, and attempted to board the front car while in motion and coming toward him, and was consequently injured, he cannot recover. The court did not err in refusing this instruction, as it is the law in this State that it is not negligence *per se* to attempt to board a slowly moving train. As before stated, there is nowhere in the record any evidence of the speed at which this car was going, and the testimony further shows that this had been the way in which the plaintiff and other drivers were wont to act. The mere opinions of the three wit-

nesses, even if their testimony referred to the danger to plaintiff himself instead of to others using the tracks, that it was dangerous, would not make it such in law.

Appellant's twenty-second and twenty-third instructions asked and refused told the jury there is no law in this State which makes it the duty of any person or corporation operating a coal mine to prop or secure the roof so that it will not fall upon those engaged in working therein; that the defendant was not charged with any duty imposed upon it by law to prop or secure the roof in the mine so that it would not fall upon the plaintiff, nor to repair or replace any props that became broken or rotten or out of repair; that this duty is imposed by law upon the workmen who work therein. The position contended for by counsel for defendant in those two instructions has been before this court in a number of cases, notably in *Consolidated Coal Co. v. Scheiber*, 167 Ill. 539, *Same v. Same*, 65 Ill. App. 304, and *Consolidated Coal Co. v. Wombacker*, 134 Ill. 57, and is based upon *Consolidated Coal Co. v. Yung*, 24 Ill. App. 255, and *Consolidated Coal Co. v. Scheller*, 42 id. 619. In the *Scheiber case, supra*, we used this language (p. 545): "Whether, therefore, it was the duty of appellant or not to prop the roof, still, if it assumed that duty and undertook to discharge it, and did so in such a careless manner that the roof was thereby loosened and rendered more liable to fall, and the plaintiff was in the exercise of due care for his own safety, as alleged and as necessarily found by the jury, the appellant would be liable. Having undertaken to perform the work it became its duty to perform it in a proper manner, whether bound in the first place to perform it at all or not. We do not, however, wish to be understood as holding with the contention of counsel that the statute has formulated a complete code of rules by which all liability of the operator or owner of the mine is to be governed, and that there is no longer any common law duty resting upon such owner or operator for a violation of which an action will lie."

Counsel for appellant contend that the statute has formulated a complete code of rules of mine management, and that the common law rules of negligence are thereby superseded, and that especially is this true so far as the care of the roof is concerned; that the statute, which requires that the owner, agent or operator of every coal mine shall keep "a supply of timber constantly on hand of sufficient length and dimensions to be used as props and cap-pieces, and shall deliver the same as required, with the miners' empty car, so that the workmen may at all times be able to properly secure said workings for their own safety," supersedes any other obligation on the part of the mine owner to look after the roof and to provide a reasonably safe place for the workmen. We are referred to the following cases in support of this contention: *Commonwealth v. Cooley*, 10 Pick. 37; *Commonwealth v. Marshall*, 11 id. 350; *Towell v. Merritt*, 3 Greenl. (Mo.) 22.

It is a well settled rule of law, and one that this court has announced, that the master owes a duty to the servant to exercise reasonable or ordinary care to provide a safe place for the servant, or a place reasonably safe and fit for the use intended, and to exercise a like degree of care in the furnishing of tools and appliances and in the selection of co-laborers. (*Chicago and Alton Railroad Co. v. Platt*, 89 Ill. 141; *Toledo, Peoria and Warsaw Railway Co. v. Conroy*, 68 id. 560.) The degree of care required on the part of the master varies with the nature of employment and the means of knowledge of the servant. This does not mean that the master is an insurer nor does it relieve the servant from due care. If the servant has no knowledge of risks of which the master has knowledge, it is his duty to warn him. If the converse is true, the servant should notify the master, or, if the peril is imminent, cease work. The requirement of the statute above referred to seeks to protect the miners by compelling the mine owner to provide material "so that the workmen may at all times be able to properly secure said

workings for their own safety." If the workmen, only, used this timber, propped the roof themselves and themselves undertook to secure the same against injury, it might well be said they assumed the risk. But here appellee had nothing to do with the roof. He found it out of repair, and the appellant had notice, through its vice-principal, Ramsey, and assumed to repair it. The evidence further shows that the company had timber-men in its employ whose duty it was to protect the roof. Appellee's duties gave him no time, nor does it appear that he had the means or ability, to make the needed repairs. It were to test the flexibility of the law too far to stretch this statutory enactment as a shield over appellant now. In the case of *Consolidated Coal Co. v. Scheller*, 42 Ill. App. 619, to the well-considered opinion of which our attention has been earnestly called, the elements here found of notice, either actual or constructive, and the promise to repair, were wholly lacking.

Complaint is made in appellant's brief of the modification of the sixteenth instruction asked. The instruction asked was as follows:

"The court instructs the jury that the plaintiff, in entering the employment of the defendant, assumed all the ordinary and usual risks and hazards of service, and if the jury believe, from the evidence, that the primary cause of the plaintiff's injury *was the fall of the coal from the roof of the mine, and that the danger of such fall was one of the ordinary and usual risks and hazards of such service*, then the jury should find the defendant not guilty."

The modification consisted in omitting the words in italics. There was no error in this.

Since the submission of this case the plaintiff has died, and the judgment in this case will be entered *nunc pro tunc* as of the date at which it was submitted.

Finding no substantial error in the record the judgment will be affirmed.

*Judgment affirmed.*

JOHN H. KELLOGG

*v.*

CHARLES J. PEDDICORD *et al.*

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Opinion filed June 17, 1899—Rehearing denied October 4, 1899.

1. APPEALS AND ERRORS—*in considering depositions chancellor has no advantage over court of review.* The opportunities and facilities of the Supreme Court for coming to a correct conclusion as to the weight and value of depositions are not inferior to those possessed by the chancellor, where the latter did not see any of the deponents or hear them testify.

2. FIDUCIARY RELATIONS—*when suspicion attaching to transactions may be removed.* Notwithstanding the law views with distrust transactions between parties occupying a fiduciary relation, such a transaction will be held to be valid if it appears that it was entered into with full knowledge of its nature and effect and was the result of deliberate, voluntary and intelligent desire on the part of the party acting, without the exercise of any influence engendered by the existing relation.

3. STATUTE OF FRAUDS—*trust may be manifested by writing not intended for that purpose.* It is not necessary, in order that a writing shall be deemed sufficient to manifest a trust, that it shall have been framed for the express purpose of acknowledging the same, it being sufficient if the recognition is incidentally made, provided the object and nature of the trust sufficiently appear.

4. SAME—*when trust is sufficiently manifested in writing.* A deposition signed and sworn to by a grantee, and voluntarily produced and filed by him in his own behalf in a proceeding to set aside his deed, may be resorted to in all its parts, even though it is partly incompetent to be received in evidence, in order to establish a trust in the property covered by the deed which is manifested and declared by him in such deposition.

5. The court reviews the evidence in this case at length, and holds it insufficient to authorize the setting aside of the deed involved on the ground of improper influence by the grantee.

APPEAL from the Circuit Court of LaSalle county; the Hon. CHARLES BLANCHARD, Judge, presiding.

BREWER & STRAWN, for appellant.

WIDMER & WIDMER, for appellees.

Mr. JUSTICE BOOGGS delivered the opinion of the court:

The circuit court of LaSalle county entered a decree vacating and canceling a deed executed by one Edward S. Peddicord, now deceased, to the appellant, which purported to convey to the latter a farm containing one hundred and sixty acres of land in section 25, township 34, north, range 4, east, in said LaSalle county. The record of that proceeding in said court is before us on appeal. The bill was filed by the appellees, who are the children, grandchildren and legatees of the said deceased grantor, and alleged two grounds of attack upon the sufficiency of the deed, viz.: First, "that said Peddicord, the grantor, at the time of the execution of said deed was not of sound mind and memory, but was in his dotage, and his mind and memory were so impaired as to render him wholly incapable of comprehending the nature and consequence of the transaction in which he was engaged;" and second, that at the time of the execution of the deed said grantor was greatly enfeebled in body and impaired in mind, and was an inmate of a sanitarium of which the appellant was superintendent and also the physician and medical adviser of the grantor, and that the appellant took advantage of the influence so alleged to be possessed over the said grantor, and by undue influence procured the execution of the deed without any consideration therefor.

Upon the hearing appellees produced a number of witnesses in support of the allegation the said grantor was lacking in mental capacity to execute the deed, but did not seek to support the charge that the deed had been procured by the exercise of undue influence on the part of any one over the said grantor. The testimony thus produced by appellees, while it tended to show the grantor was not exempt from the ills and afflictions of a physical character which ordinarily affect men of his age, had little, if any, tendency to establish that his mental faculties were impaired, and, so far as it had such tendency, it was met and clearly overcome by that of witnesses produced

in behalf of appellant. Upon this proposition the preponderance, in point of number of witnesses and also in point of clearness, reasonableness and probability of their statements, was unmistakably with the appellant. The entire testimony showed the grantor was the owner of much valuable property, both real and personal, which he had accumulated by his own exertions; that he never relinquished the control and management of his business affairs, but directed and supervised farming operations upon eight different farms, including the buying, feeding and selling of cattle in large numbers, the storing and selling of grain in large quantities which his farms produced, and the purchase of farming implements and supplies; that he transacted business affairs with bankers and other business men, and there is nothing in the testimony to indicate he was lacking in judgment, discretion, prudence or care. His affairs did not suffer, but prospered, under his control. There is no room for the contention he was mentally incapable of disposing of his property, and so the chancellor concluded, as is evidenced by the fact the decree is based solely upon the finding the deed was the result of the exercise, upon the part of the appellant, of an undue and improper influence over the grantor. The appellees, complainants below, did not produce any proof tending, or which was intended, to support this finding of the court. If the finding can be upheld at all, the evidence upon which to do so must be gathered from testimony produced on behalf of appellant for the express purpose of disproving the charge. We have subjected this testimony to a most thorough investigation. It consisted wholly of depositions taken before a commissioner in the city of Battle Creek, in the State of Michigan. The chancellor did not see any of these witnesses or hear any of them testify. Our opportunities and facilities for coming to a correct conclusion as to the weight and value of their testimony are in no degree inferior to that of the trial judge.

The position of counsel for appellees is, that it appeared from the testimony the relation of medical adviser and patient existed between the grantor in the deed and the appellant at the time the deed was executed, and that that fact alone warranted and demanded the decree vacating the deed,—and authorities are cited as in support of the position. The rule in our State is, that the existence of a confidential or fiduciary relation may give rise to suspicion, and if, upon consideration of all the facts and circumstances bearing upon the good faith and fairness of the transaction between the parties standing in such relation to each other, a reasonable suspicion exists that confidence was reposed and has been abused, the transaction should be set aside. (*Uhlich v. Muhlke*, 61 Ill. 499; *Herr v. Payson*, 157 id. 244.) Notwithstanding the relation, and that the law views with distrust transactions whereby the party having the confidence of the other obtains property, the distrust or suspicion may be shown to be unfounded, and will be removed and the transaction regarded as valid as if it be made to appear it was entered into with full knowledge of its nature and effect, and was the result of deliberate, voluntary and intelligent desire of the party acting, and was not secured by the exercise of the influence engendered as an effect of the relation. *Uhlich v. Muhlke, supra.*

Excluding from consideration all statements in the deposition of the appellant relating to conversations or circumstances which occurred prior to the death of the grantor, the facts disclosed in this case are, that the appellant was the superintendent of a sanitarium at Battle Creek, Michigan, and had occupied that position for about twenty years; that the sanitarium is one of the largest of the institutions of its kind, capable of furnishing accommodation for one thousand patients, and has constantly and regularly connected with it from seven to ten attending physicians; that the appellant, as superintendent, although a physician, did not attend upon the patients

personally, nor did he treat or prescribe for the grantor; that the appellant was also superintendent of the "Workingmen's Home" and was connected with the management of the "Missionary Settlement,"—charitable and benevolent associations located in the city of Chicago; that the grantor, then about seventy-four years of age, came to the sanitarium for treatment on the 19th day of May, 1896, and remained there until he died, on the 25th day of June of the same year; that he had been a patient at the sanitarium in prior years, first about 1877 and later in 1884 or 1885; that the grantor was a farmer, stock grower and dealer in stock, and had been very successful in all of these lines; that he was possessed of personal property in value to the amount of \$10,000 above all his indebtedness, and was the owner of eight different farms in La-Salle county, Illinois, which were valued in the inventory filed by the executor of his estate at about \$75,000, one of which, valued at \$13,000, is the property purported to be conveyed by the deed sought to be canceled; that he was a member of the Baptist church, and had been thinking of devoting some portion of his property to religious or charitable purposes; that at the sanitarium he became acquainted with the Rev. Samuel Sherin, a clergyman of the Methodist Episcopal church, who was also a patient receiving treatment there; that Mr. Sherin was much interested in the work of the Workingmen's Home of Chicago, and had frequent conversations with the grantor with reference to that institution and to the beneficial character of its work; that the grantor made many inquiries of Mr. Sherin as to the details of the operation of the home, the methods employed to assist homeless men and give them opportunities to secure employment, etc., and became favorably impressed with the home as a benevolent and charitable institution and deemed it of much service to the class it was designed to assist; that during the week prior to the execution of the deed, the grantor, on two or more occasions, told Mr. Roberts, his nurse,

that he desired to see the appellant, and spoke about the Workingmen's Home in Chicago and about assisting that institution in a financial way, and that he believed the institution would make good use of any means with which it might be entrusted; that he renewed his request to see the appellant and complained that the appellant had not called upon him; that on Tuesday prior to the execution of the deed on Saturday, the grantor requested his attending physician, Dr. Rand, to procure him an interview with appellant; that Dr. Rand made known the grantor's desire to the appellant, but that the latter was unable to call on that day; that the grantor renewed his request to his attending physician on the next day, and that the physician so advised the appellant, and that the appellant did not come on that day, but did call upon the grantor the next day in response to a similar request made then to his attending physician, Dr. Rand, but could not then spare as much time as the grantor desired he should, and the conversation had between them did not relate to the subject of the execution of the deed; that the appellant is of that religious faith holding the view that Saturday is the Sabbath or Lord's day, and observed it accordingly; that the grantor was aware of this, and regarding the day as one favorable to the accomplishment of his desire to have an interview with appellant, requested his nurse to wheel him in an invalid chair from his room in the principal building of the sanitarium to the residence of the appellant; that he was so taken by his nurse to the home of the appellant without the previous knowledge of appellant and there had an interview with appellant.

The only testimony disclosing the conversation which occurred between them is that of the appellant, which, on motion of the appellees, was excluded from consideration. It appeared, however, that as the result of the interview Mr. Hulbert, a member of the bar of the State of Michigan, a resident of Battle Creek, and who was the legal adviser

of the sanitarium and of the appellant, and had acted in that capacity since 1881, was summoned by appellant to attend at his home, and came while the grantor yet remained there; that appellant had for many years provided in his own residence a home for from twelve to twenty children, and that when Mr. Hulbert arrived at appellant's home these children were seated in a circle on the lawn under a tree, engaged in singing; that the grantor was seated in an invalid chair within the circle, listening to the songs of the children, and the appellant was standing near; that he (Hulbert) called the appellant, and they stepped to the other side of the house and sat down under a shade tree there and had a conversation, which the witness (Hulbert) was not allowed to give; that Mr. Hulbert returned to his office and prepared a form for a warranty deed from Mr. Peddicord, the grantor, to appellant, not containing, however, the description of the premises to be conveyed; that about sun-down of the same day he returned to the office of the appellant and there inserted the description of the premises from information received then from appellant, and that Mr. Hulbert, appellant, Dr. Rand and Mr. Hoover went to the room of Mr. Peddicord in the sanitarium; that Mr. Hulbert said to the grantor, "Dr. Kellogg tells me you wish to make a conveyance of some land in Illinois to be used for charitable and philanthropic purposes," to which Mr. Peddicord replied he did; that Mr. Hulbert said, "I will read this deed over to you and explain some features of it which are a little out of the ordinary," and then proceeded to read the deed and explain to Mr. Peddicord that the deed was made direct to appellant because it was better to have the title in Dr. Kellogg than in the Chicago institution; that Mr. Peddicord requested him to read again the clause reserving a life estate in the grantor, and that he did so, and that Mr. Peddicord then signed the deed and acknowledged it before Mr. Hulbert as notary public, and Dr. Rand, Mr. Hoover and Mr. Hulbert signed it as witnesses.

The record is barren of any testimony showing that the appellant said or did anything with the intent, or which had any tendency, to induce the execution of the deed. Nor do we find anything in the testimony tending to show it was the desire of the appellant the transaction should be kept secret from the relatives of the grantor, but, upon the contrary, it was proven that the appellee Mrs. Jane Smouse, a daughter of the grantor, arrived at the sanitarium after the execution of the deed and prior to the death of her father, and that the appellant, in her presence, requested the grantor to tell his daughter all that had been done in regard to the execution of the deed, and that the father said he had already done so, and the daughter confirmed the statement of the father. It also appeared the appellant sent two telegrams to the appellee Charles J. Peddicord, a son of the grantor, advising him that the physical condition of his father was such that he should come immediately to the sanitarium to see him. That the conveyance, though absolute on its face, was in trust for the benefit of the philanthropic purposes of the Workingmen's Home in the city of Chicago was openly and publicly stated by the appellant at the time of the execution of the deed, and again at the time of the conversation between the appellee Mrs. Jane Smouse, her father and the appellant, and is specifically and expressly avowed and declared in the answer filed by the appellant to the bill filed in the cause, and the declaration set out in the said answer is followed by a distinct and positive statement that the property is so held and that it will be so devoted and appropriated, and the trust and objects and nature are fully set out and declared in the deposition signed and sworn to by the appellant, and tendered and filed in court as evidence in his behalf and certified to the court as a part of the record of the cause.

The facts and circumstances which attended the execution of the conveyance here involved, thus fully dis-

closed by the testimony, are not questioned by contradictory proof on the part of the complainants, and are of such a character as to remove all imputations of unfairness, abuse of confidence or improper exercise of influence on the part of appellant or any other person. The chancellor erred in holding otherwise. It is true that under the Statute of Frauds all declarations of trust in real estate "shall be manifested and proved by some writing" signed by the declarant; but it is not necessary, in order that a writing shall be deemed sufficient to manifest a trust, it shall have been framed for the purpose of acknowledging the trust. It is sufficient if the recognition or admission of it is even incidentally made in writing, as in the course of a correspondence, (*Kingsbury v. Burnside*, 58 Ill. 310; *Moore v. Pickett*, 62 id. 158;) or in a receipt or a memorandum, provided the objects and nature of the trust appear with sufficient certainty from such documents. (27 Am. & Eng. Ency. of Law, 47-51.) In this instance the trust is sufficiently manifested and proved by the deposition voluntarily signed and sworn to by the appellant and produced by him in his own behalf, and caused by him to be filed in the cause as being competent, and incorporated into the record as being competent evidence in his behalf. Though not competent, in some of its parts, to be received in evidence, the deposition is, as to other statements therein made, competent testimony, and having been voluntarily made by the appellant and produced by him in his own behalf it may be resorted to in all of its parts to establish the trust therein manifested and declared. There is no reason the manifest wish of the grantor to devote the farm in question to benevolent purposes should be thwarted by the courts.

The decree appealed from must be and is reversed and the cause remanded, with directions to the chancellor to enter a decree finding the conveyance to be valid and effectual to vest the appellant with the title to the prem-

ises therein described, as trustee, and specifying the nature, objects and purposes of the trust, and decreeing he shall hold the same, as trustee, for the purposes of the trust.

*Reversed and remanded.*

• PRENTISS D. CHENEY

*v.*

ANDREW W. CROSS.

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*Opinion filed June 17, 1899—Rehearing denied October 6, 1899.*

1. PRACTICE—*alleged errors cannot be first urged in reply brief.* Under rule 15 of the Supreme Court it is not permissible to urge in the reply brief an alleged error or ground for reversal not contained in the brief in chief.

2. SAME—*mixed questions of law and fact are settled in Appellate Court.* On appeal from a judgment of the Appellate Court affirming the lower court's judgment in a suit at law, mixed questions of law and fact are not subject to review by the Supreme Court.

*Cheney v. Cross*, 80 Ill. App. 640, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Jersey county; the Hon. OWEN P. THOMPSON, Judge, presiding.

THOMAS F. FERNS, and A. H. BELL, for appellant.

HAMILTON & HAMILTON, and GEORGE W. HERDMAN, for appellee.

Per CURIAM: This was an action of assumpsit, instituted by the appellee, against the appellant, to recover upon a promissory note executed by the latter to the former, and also for attorney's fees, costs and expenses incurred in the prosecution of an action brought by him in the State of New Jersey on another note executed by one D'Arcy, payable to appellant, and which was deliv-

ered to the appellee as collateral security for the note given by appellant to appellee. Appellant filed a plea of set-off, the averments whereof in substance were, that appellee, prior to bringing action on the note held as collateral security, sold and assigned the note given him by the appellant, and was defeated in the action to collect the note held as collateral because he brought said suit in his own name and was without beneficial interest therein, and that appellant had no notice or knowledge that appellee had endorsed and assigned the principal note until after the note held by him as collateral had become barred by operation of the Statute of Limitations. Appellee replied that he prosecuted the suit in the State of New Jersey with due care and diligence; that he gave appellant full notice of the suit; that appellant advised appellee and his attorney in said suit as to the course to be pursued until the termination of the action, was present at the trial and participated fully in the prosecution thereof, and that the suit upon said note was defeated upon the issue there was no consideration for the execution thereof. The cause was submitted to the court for trial without a jury. The court found the issues for the plaintiff and entered judgment accordingly, and such judgment was affirmed by the Appellate Court for the Third District. This is an appeal to reverse the judgment of the Appellate Court.

We are restricted to the review of questions of law arising on the record. (Hurd's Stat. 1895, chap. 110, sec. 89, entitled "Practice.") The affirmance of the judgment by the Appellate Court implies a finding of facts in the same way as found by the trial court, (*Kreigh v. Sherman*, 105 Ill. 49; *Paddon v. People's Ins. Co.* 107 id. 196;) and this court is precluded from reviewing controverted questions of fact. (*Capen v. DeSteiger Glass Co.* 105 Ill. 185; *Indianapolis and St. Louis Railroad Co. v. Morgenstern*, 106 id. 216.) Nor are mixed questions of law and fact subject to review in this court. *Meyer v. Butterbrodt*, 146 Ill. 131.

The motion of appellant for judgment on the pleading, entered at the time the court overruled appellee's demurrer to certain counts of appellant's plea of set-off, was properly denied. Appellee had the right to plead over to such counts. The motion was renewed after the issues had been joined, a jury waived and the cause submitted to the court for trial, and was, it is urged, erroneously overruled. Neither of these alleged errors is mentioned in the brief in chief for appellant. In the reply brief the rulings of the court on these motions are mentioned as being questions of law open for review in this court, but it is not pointed out wherein it is supposed the court erred in any of the many rulings upon questions of pleading, nor are any grounds disclosed or reasons advanced in support of the motion. Moreover, it is not permissible, under rule 15 of the rules of this court, to urge in the reply brief an alleged error or point for reversal not contained in the brief in chief.

It is not complained the court erred in passing upon any question relative to the admissibility of testimony.

Aside from the general statement, "the propositions (of law) asked by appellee were improperly given," there is no complaint in the brief in chief as to the action by the court in that respect. In the reply brief, objections to one of such propositions are specified, but we need not refer thereto further than to say such specification is in violation of rule 15, before referred to, and that it would not be just to appellee, who has not had and cannot have opportunity to be heard upon the question, that we should consider the objections. It is not improper we should remark the proposition referred to called upon the court to rule upon a mixed question of law and fact, and for that reason the ruling is not subject to review in this court. *Meyer v. Butterbrodt, supra.*

The court held ten of the propositions of law asked by appellant to be correct and refused to so hold as to four others. In the brief it is asserted those "refused

by the court were improperly refused," but no reason to maintain the assertion is advanced, except as to proposition No. 14 refused. As to No. 14, counsel insist it was, in effect, "a motion to find for the appellant," and for that reason urge it should have been given. The proposition is as follows:

"The court holds that under the law and evidence the finding of the court should be for the defendant, Cheney, for such sum as the value of the D'Arcy note exceeds in value the amount due on the principal note due from Cheney to Cross."

This proposition, and the action of the court upon it, do not raise any question of law for re-examination in this court. The appellant occupied the position of a plaintiff on the issues made under his plea of set-off, and in order to prevail thereon it was necessary such issues should be sustained by a preponderance of the evidence produced upon the hearing. (*Laird v. Warren*, 92 Ill. 204; *Osgood v. Groseclose*, 159 id. 511.) The testimony bearing upon the issues raised by the plea of set-off was contradictory, and in the opinion of the trial judge and of the Appellate Court the evidence did not so preponderate. The action of the court in refusing the proposition may as well be attributed to the view entertained by the court as to the weight of the evidence, as the view upon any point of law involved in the proposition.

Notwithstanding the fact counsel for appellant have not advised us in what respect it is supposed the court erred in refusing to hold the three other refused propositions, we have examined them in connection with the propositions held in his behalf, and find all the principles of law referred to in the refused propositions are correctly announced in the propositions held in behalf of the appellant.

Finding none of the alleged errors to be well assigned the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

THE NATIONAL HOME BUILDING AND LOAN ASSOCIATION  
v.THE HOME SAVINGS BANK *et al.*

Opinion filed June 20, 1899—Rehearing denied October 6, 1899.

1. CORPORATIONS—when corporation is estopped to plead *ultra vires*. A corporation having received the benefit of a contract may be estopped to raise the defense of *ultra vires* where the contract is within its power but there has been a failure to comply with some regulation or the power has been improperly exercised.

2. SAME—corporation is not estopped to raise defense of *ultra vires* if power is wanting. A contract beyond the power of a corporation is void, and the fact the corporation has received the benefit thereof or the other party has acted thereunder does not estop the corporation from raising the defense of *ultra vires*. (CARTER, J., dissenting.)

3. SAME—one dealing with corporation of limited powers is chargeable with notice. A party dealing with a corporation having limited and delegated powers conferred by law is chargeable with notice of them and their limitations, and cannot plead ignorance in avoidance of the defense of *ultra vires*.

4. LOAN ASSOCIATIONS—loan association cannot trade in real estate. A loan association organized under the law of 1879, (Laws of 1879, p. 83,) has no power to acquire and hold real estate except such as has been mortgaged to it or in which it has an interest, and contracts made for the purchase of real estate in which it has no interest are not enforceable.

5. SAME—when loan association is not liable for deficiency on foreclosure. A building and loan association has no power, in exchanging properties, to acquire a lot in which it had no interest and assume an encumbrance thereon, and no deficiency decree can be rendered against it on foreclosure of the encumbrance.

*Nat. Home Building Ass. v. Home Sav. Bank*, 79 Ill. App. 303, reversed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. NATHANIEL C. SEARS, Judge, presiding.

CUTTING, CASTLE & WILLIAMS, and WAGNER, BINGHAM & LONG, for appellant:

A building and loan association has no power to purchase real estate upon which it had no mortgage, lien

181	35
88a	472
88a	473
181	35
f185	39
87a	59
181	35
186	198
181	35
187	143
d90a	292
91a	550
181	35
188	89
f92a	88
92a	88
e92a	180
e92a	181
181	35
190	389
181	35
97a	657
181	35
d199	211
181	35
d201	507

181	35
105a	884
105a	610
181	35
204	152
e205	1842
dl07a	846
181	35
212	1587
212	1541
114a	201
114a	488
181	35
215	194
115a	496

or other encumbrance or in which it had no interest, and therefore it has no power to assume and agree to pay a mortgage on such real estate so purchased by it. Rev. Stat. chap. 32, sec. 13; *Railroad Co. v. Collins*, 40 Ga. 582; *Reese on Ultra Vires*, 9, 10, 17, 21, 48, 54, 55, 81, 85; *Head v. Insurance Co.* 2 Cranch, 127; *People v. Insurance Co.* 15 Johns. 357; *Insurance Co. v. Sturges*, 2 Cow. 664; *Perrine v. Canal Co.* 9 How. 172; *Pearce v. Railroad Co.* 21 id. 441; *Hood v. Railroad Co.* 22 Conn. 502; *Thomas v. Railroad Co.* 101 U. S. 71; *Davis v. Railroad Co.* 131 Mass. 258; *Central Trans. Co. v. Pullman Car Co.* 139 U. S. 24; *Coleman v. Railway Co.* 10 Beav. 1; *Lucas v. White Line Trans. Co.* 70 Iowa, 541; *Railway Co. v. Railway Co.* 11 C. B. 775; *Bissell v. Railroad Co.* 22 N. Y. 258; *Jameson v. Bank*, 122 id. 135; *Fridley v. Bowen*, 87 Ill. 154; *Chicago Gas Light Co. v. Gas Light Co.* 121 id. 530; *Endlich on Building Ass.* (1st ed.) secs. 120, 283, 305, 307; *McCauly v. Building Ass.* 37 S. W. Rep. 212; *People v. Gas Trust Co.* 130 Ill. 268; *Metropolitan Bank v. Godfrey*, 23 id. 579.

There being no power in the association to make the contract to pay the mortgage it could not ratify it. *Central Trans. Co. v. Pullman Car Co.* 139 U. S. 24; *Thompson on Corp.* secs. 6007, 6009; *Reese on Ultra Vires*, secs. 46, 59, 60, 72, 98; *Marble v. Harvey*, 92 Tenn. 115; *Morawetz on Corp.* p. 551, sec. 581; *Durkee v. People*, 53 Ill. App. 396; *Albert v. Bank*, 1 Md. Ch. 407.

Estoppel cannot be urged against a party to a contract not fully performed. *Thompson on Corp.* sec. 6024; *Swan v. Scott*, 11 S. & R. 155; *Reese on Ultra Vires*, sec. 71.

Relief will not be given when an illegal contract is relied on to sustain it. *Fridley v. Bowen*, 87 Ill. 151; *Bishop v. Preservers' Co.* 157 id. 284; *Central Trans. Co. v. Car Co.* 139 U. S. 24; *Reese on Ultra Vires*, secs. 69, 70, 72, 73; 7 *Wait's Actions and Defenses*, 64; *McNulta v. Bank*, 164 Ill. 427.

A member of a building and loan association is charged with notice of the powers conferred on its officers and the provisions of its charter. *Citizens' Building Ass. v. Ruhl*, 55 Ill. App. 65; *Morawetz on Corp.* secs. 580-591; *Angell &*

Ames on Corp. secs. 288-301; Thompson on Corp. sec. 6009; Reese on Ultra Vires, secs. 52, '53; *Thompson v. Paper Co.* 187 Mass. 595; *Bank v. Alden*, 129 U. S. 372.

WINSTON & MEAGHER, and ALEXANDER L. WHITE-HALL, (RALPH MARTIN SHAW, of counsel,) for appellees:

If agents conduct themselves so that, if they had been acting for private employers, the person for whom they were acting would have been affected and bound by their conduct, the same rule must prevail when the principal under whom the agent acts is a corporation. *Insurance Co. v. Schettler*, 38 Ill. 166; *Inter-State Building Ass. v. Ayres*, 177 id. 9; *Merchants' Bank v. Bank*, 10 Wall. 604; *Railroad Co. v. Schuyler*, 34 N. Y. 30; *Railroad Co. v. Quigby*, 21 How. 202; *Bank v. Graham*, 100 U. S. 699; *Henderson v. Railroad Co.* 17 Tex. 560; *Leopold Rolling Mill Co. v. State*, 54 Ga. 635; *Frankfort Bank v. Johnson*, 24 Me. 490; *Allison v. Railroad Co.* 46 S. W. Rep. 348.

A corporation, like a private individual, may by its acts ratify the unauthorized transactions of its agents. *Drescher v. Fulham*, 52 Pac. Rep. 685; *Miller v. Matthews*, 40 Atl. Rep. 176; *Ragland v. McFall*, 137 Ill. 181.

When the officers or agents of a corporation exercise powers affecting the interests of third parties, which presupposes a delegated authority for that purpose, and other acts subsequently performed show the corporation must have contemplated the legal existence of such authority, the acts of such officers or agents will be deemed rightful and the delegated authority will be presumed. *Insurance Co. v. Schettler*, 38 Ill. 166; *Railroad Co. v. Dalby*, 19 id. 352; *Miners' Ditch v. Zellerbach*, 37 Cal. 543; *Metropole Bath Co. v. Fan Co.* 50 Ill. App. 681; *Supervisors v. Schenck*, 5 Wall. 772; *Insurance Co. v. White*, 106 Ill. 67; *Railroad Co. v. Schuyler*, 34 N. Y. 58; *Page v. Water Co.* 31 Fed. Rep. 257.

If it is possible, under any hypothetical condition of facts, for an act to be within the express or implied power of a corporation, the corporation will be estopped

in a particular instance to say that the act is not within such expressed or implied power, when such a defense would be to the injury of a party contracting with it, unless the act itself is *malum prohibitum* or *malum in se*. *Bissell v. Railroad Co.* 22 N. Y. 258; *Railroad Co. v. Schuyler*, 34 id. 30; *Grommes v. Sullivan*, 81 Fed. Rep. 45; *Supervisors v. Schenck*, 5 Wall. 772; *Railroad Co. v. McCarthy*, 96 U. S. 258; *State Board of Agriculture v. Railway Co.* 47 Ind. 407; *Miners' Ditch v. Zellerbach*, 37 Cal. 543.

The plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong. *Kadish v. Building Ass.* 151 Ill. 531; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Darst v. Gale*, 83 Ill. 136; *Railway Co. v. McCarthy*, 96 U. S. 258; *San Antonio v. Mehaffy*, id. 312.

When a party dealing with a corporation has acted in good faith and the contract has been completely executed, the corporation receiving the benefit thereof, and nothing remains to be done except the payment by the corporation to the party, the corporation is always estopped to set up its want of authority as a defense, unless the action is *malum in se* or *malum prohibitum*. This is always the law, even though the party contracting with the corporation knows at the time that the corporation is transacting business beyond its chartered powers. *Bradley v. Ballard*, 55 Ill. 413; *Parish v. Wheeler*, 22 N. Y. 494; *Towers Excelsior Co. v. Inman*, 23 S. E. Rep. 418; *Eckman v. Railroad Co.* 169 Ill. 312; *Kadish v. Building Ass.* 151 id. 531; *Darst v. Gale*, 83 id. 136; *Sioux City Terminal Co. v. Trust Co.* 82 Fed. Rep. 124; *Lyon v. Bank*, 85 id. 120; *Central Trust Co. v. Railway Co.* 87 id. 815; *Speer v. Commissioners*, 88 id. 748; *Railroad Co. v. Thompson*, 103 Ill. 187; *Dimpfel v. Railway Co.* 9 Biss. 127; *Union Trust Co. v. Railroad Co.* 117 U. S. 434; *Bank v. Matthews*, 98 id. 621; *Manufacturing Co. v. Metal Co.* 127 N. Y. 452; *Whitney Arms Co. v. Barlow*, 63 id. 62; *Woodruff v. Railway Co.* 93 id. 609; 29 Ohio St. 330.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

In November, 1893, Flora D. Bishopp made a trade of lots in the city of Chicago with the National Home Building and Loan Association, appellant, in pursuance of which appellant conveyed to her lot 10 in Lee Bros.' addition to Englewood, lots 15 and 16 in block 60 in Chicago University subdivision, and lot 36 in block 2 in Herring's subdivision. In exchange for these lots said Flora D. Bishopp and Jonathan D. Bishopp, her husband, conveyed to the building and loan association lots 5 and 6 in block 2 in Johnson & Clement's subdivision, and in the deed of the same it was agreed that the building and loan association should assume and pay an encumbrance on said lot 5 in the form of a trust deed executed by said Flora D. Bishopp and husband to Charles T. Page, trustee, to secure a note for \$3000 and interest. The trade was negotiated and carried out on the part of the association through J. O. Duncan, agent, who was employed by the association to negotiate loans and examine abstracts for it in Chicago, and he acted under the direction of the secretary of the association. After the exchange the association paid a mortgage of \$600 on said lot 5 and the delinquent interest on the mortgage assumed in the conveyance. On May 14, 1895, the board of directors passed a resolution that the assumption clause in the deed was made without authority of the association, and directed the execution and tender of a quit-claim deed of the lot to Flora D. Bishopp. The deed was made and tendered unconditionally, and the association thereby offered the lot to her without a return of the consideration or any other condition. The note for \$3000, secured by the trust deed, was transferred to the Home Savings Bank, one of the appellees, and it filed its bill in the superior court of Cook county to foreclose the same, asking for a decree against Flora D. Bishopp, a sale of the mortgaged premises, and a decree against the building and loan associa-

tion for such deficiency as might exist. The building and loan association answered that the trade was consummated by direction of its president and secretary, but the clause assuming the mortgage was inserted without their knowledge or authority and without the knowledge and authority of its board of directors, that such an agreement was *ultra vires* the corporation, and that it had tendered a quit-claim deed of the lot to the said Flora D. Bishopp. The bill was answered by Flora D. Bishopp and her husband, who admitted its material allegations and filed their cross-bill, alleging the agreement for an exchange of the properties and the conveyances and asking for a deficiency decree against the association. The building and loan association answered the cross-bill, setting up the same defense as before, and the cause was referred to a master, who reported in favor of a foreclosure and sale and a decree against the building and loan association for any deficiency in the payment of the debt, interest, fees and costs. Exceptions to the report were overruled and a decree was entered in accordance with it, which has been affirmed by the Appellate Court.

No objection is made to the foreclosure of the trust deed or the sale of the premises, and the only question involved in this appeal is whether the contract inserted in the deed, by which the defendant, the National Home Building and Loan Association, agreed to assume and pay the debt, is binding upon it. This defendant, which denied the binding force of the agreement, is a corporation organized under the provisions of an act entitled "An act to enable associations of persons to become a body corporate to raise funds to be loaned only among the members of such association," in force July 1, 1879. (Laws of 1879, p. 83.) As a corporation it is a creature of the law, having no powers but those which the law has conferred upon it. A corporation has no natural rights or capacities, such as an individual or an ordinary partnership, and if a power is claimed for it, the words

giving the power or from which it is necessarily implied must be found in the charter or it does not exist. The law on this subject is stated by the Supreme Court of the United States in *Central Transportation Co. v. Pullman Palace Car Co.* 139 U. S. 24, as follows: "The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental." The purpose of this corporation is the raising of funds to be loaned to its members upon the security of its stock and unencumbered real estate. Manifestly the business of trading in real estate or acquiring the same, except as incidental to their legitimate business, is wholly foreign to the purpose for which the State has created such corporations and conferred upon them corporate powers. They have no power to take and hold real estate, and contracts made for the purchase of it are not enforceable. (Endlich on Building Associations, secs. 305-308.) But for the purpose of collecting debts it is essential that they should have some power with respect to the real estate mortgaged to them, and for that purpose section 13 of the act for their incorporation provides as follows: "Any loan or building association incorporated by or under this act is hereby authorized and empowered to purchase at any sheriff's or other judicial sale, or at any other sale, public or private, any real estate upon which such association may have or hold any mortgage, lien or other encumbrance, or in which said association may have an interest, and the real estate so purchased, to sell, convey, lease or mortgage at pleasure to any person or persons whatsoever." Such corporations are not authorized, either by their charters or as an incident to their existence, to acquire or hold any real estate; except such as has been mortgaged to them or which they may have an interest in: Not only is this the rule to be derived from the act of the legislature authorizing their incorporation, under the general principles of law, but it

is, and always has been, against the policy of the State to permit corporations to accumulate landed estates, or to own real estate beyond what is necessary for their corporate business or such as is acquired in the collection of debts. (*Carroll v. City of East St. Louis*, 67 Ill. 568; *United States Trust Co. v. Lee*, 73 id. 142; *People v. Pullman Palace Car Co.* 175 id. 125; *First M. E. Church of Chicago v. Dixon*, 178 id. 260.) It is also a settled principle of American jurisprudence. (5 Thompson's Law of Corporations, sec. 5772.) If a building and loan association were permitted to invest its money in the purchase of real estate or to traffic or trade in such property instead of keeping within the powers conferred upon it by loaning such money and collecting it, it would not only be exercising powers not granted, but it would be carrying on a business inconsistent with the purpose of its creation and against the fixed and uniform policy of the State. In *People ex rel. v. Chicago Gas Trust Co.* 130 Ill. 268, it was said (p. 292): "The word 'unlawful,' as applied to corporations, is not used exclusively in the sense of *malum in se* or *malum prohibitum*. It is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do,—or, in other words, such acts, powers and contracts as are *ultra vires*." In *Central Transportation Co. v. Pullman Palace Car Co. supra*, the result of the decisions as to the exercise of powers not granted is summed up, as follows: "All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts,—and this upon three distinct grounds: the obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks which they have never undertaken; and above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

It is first contended, in support of the decree, that the contract by which the corporation assumed and agreed to pay the mortgage on lot 5 as a part of the consideration was within its powers. The ground of this claim is, that the corporation had a mortgage on lot 6, (the other lot which was conveyed to it,) and the acquisition of that lot was a legitimate exercise of power. We do not see how the fact that it had power to purchase one lot would operate to give it power to purchase another. The right to acquire property in which it had an interest could not be extended to other property in which it had no interest. If it could make a loan on a lot and buy other property in the vicinity or adjoining it by merely including in the deed the mortgaged lot, the law would be evaded and the policy of the State subverted. The law has given such a corporation power to purchase such real estate as it has a mortgage on for its necessary protection in making collections, but that does not authorize it, by including such real estate, to buy another lot or a subdivision or part of a town, and enter into the business of trading in real estate. If it could not purchase lot 6, upon which it held a mortgage, without buying other real estate, it was not authorized to buy it at all.

It is also argued that the building and loan association is estopped to raise the question whether the contract was *ultra vires* because it has received the benefit of the contract by the conveyance of property to it. That depends, as we think, upon the sense in which the term *ultra vires* is used. It has been applied indiscriminately to different states of fact in such a way as to cause considerable confusion. When used as applicable to some conditions, it has been frequently said that a corporation is estopped to make such a defense where it has received the benefit of the contract. For example, the term has been applied to acts of directors or officers which are outside and beyond the scope of their authority, and therefore are invasions of the rights of stockholders, but

which are within the powers of the corporation. In such a case the act may become binding by ratification, consent and acquiescence, or by the corporation receiving the benefit of the contract. Again, it has been applied to cases where an act was within the authority of the corporation for some purposes or under some circumstances, and where one dealing in good faith with the corporation had a right to assume the existence of the conditions which would authorize the act.\* Where an act is not *ultra vires* for want of power in the corporation but for want of power in the agent or officer, or because of the disregard of formalities which the law requires to be observed, or is an improper use of one of the enumerated powers, it may be valid as to third persons. In the more proper and legitimate use of the term it applies only to acts which are beyond the purpose of the corporation, which could not be sanctioned by the stockholders. There would, of course, be no power to confirm or ratify a contract of that kind, because the power to enter into it is absolutely wanting. If there is no power to make the contract there can be no power to ratify it, and it would seem clear that the opposite party could not take away the incapacity and give the contract vitality by doing something under it. It would be contradictory to say that a contract is void for an absolute want of power to make it and yet it may become legal and valid as a contract, by way of estoppel, through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power.

The powers delegated by the State to the corporation are matters of public law, of which no one can plead ignorance. A party dealing with a corporation having limited and delegated powers conferred by law is chargeable with notice of them and their limitations, and can not plead ignorance in avoidance of the defense. (*Franklin Co. v. Lewiston Institution for Savings*, 68 Me. 43; *New Orleans, Florida and Havana Steamship Co. v. Ocean Dry Dock*

Co. 28 La. Ann. 173.) Concerning this subject it is said in *Thomas v. West Jersey Railroad Co.* 101 U. S. 71: "To hold that this can be done is, in our opinion, to hold that any act done under a void contract makes all its parts valid, and that the more you do under a contract forbidden by law the stronger the claim to its enforcement in the courts." We quote again from *Central Transportation Co. v. Pullman Palace Car Co.*, as follows: "The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation which is *ultra vires* in the proper sense,—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature,—is not voidable only, but wholly void and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are pre-requisites to its existence or to its action, because such pre-requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws." See, also, *Reese on Ultra Vires*, secs. 46-72, for a full discussion of the subject. In *Durkee v. People*, 155 Ill. 354, the same rules were laid down, and it was pointed out that the cases where a corporation is estopped from

asserting that a contract is *ultra vires* when it has received a benefit under the contract is where the making of the contract is within the scope of the franchise, and the contract is sought to be avoided because there was a failure to comply with some regulation or the power was improperly exercised. The following was there quoted from the opinion in *Davis v. Old Colony Railroad Co.* 131 Mass. 258: "There is a clear distinction, as was pointed out by Mr. Justice Campbell in *Zabriskie v. Cleveland, Columbus and Cincinnati Railroad Co.*, by Mr. Justice Hoar in *Monument Bank v. Globe Works*, and by Lord Chancellor Cairns and Lord Hatherley in *Ashbury Railway Carriage and Iron Co. v. Riche*, between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice, and the abuse of a general power or the failure to comply with prescribed formalities or regulations in a peculiar instance, when such abuse or failure is not known to the other contracting parties."

The cases in this court where the corporation has been held to be estopped have been where the act complained of was within the general scope of the corporate powers. *Ottawa Northern Plank Road Co. v. Murray*, 15 Ill. 336, was a case where the corporation was expressly authorized to borrow money and to mortgage its road. Money was borrowed and received by the corporation and a bond and mortgage were executed. The corporation sought to question the official character of the persons who borrowed the money and executed the mortgage as directors of the company. It was held that the corporation could not dispute their official relation after receiving the money.

In *Bradley v. Ballard*, 55 Ill. 413, the North Star Gold and Silver Mining Company had given its notes for borrowed money. The court said: "The borrowing of the money was not, in itself, an act *ultra vires*, nor was the giving of the notes. The money was not borrowed to be

used for an illegal or immoral purpose. The lenders have been guilty of no violation of law nor wrong of any kind." The bill was filed in the case by one of the stockholders to enjoin the payment of the notes, because the money was appropriated to mining in the territory of Colorado. It was not decided whether engaging in mining in Colorado was *ultra vires* or not, but the doctrine of *ultra vires* has never been carried to the extent of requiring one who honestly lends money to a corporation authorized to borrow it, to see that it is not applied to an improper purpose. The transaction was perfectly lawful and not *ultra vires* the corporation, and the rights of the lender were maintained, with some natural and proper remarks about honesty as applied to corporations.

In *Darst v. Gale*, 83 Ill. 136, an insurance company borrowed money which it had a right to borrow to carry on its business, and mortgaged real estate to secure its payment. A purchaser of the real estate subsequent to the trust deed, and therefore subject to it, tried to avoid the encumbrance on the ground that the company had no right to execute the mortgage. The court said: "That in certain cases it might have lawfully done so, even against the remonstrance of those who had the right to directly interfere in its management, we think can admit of but little controversy." It was deemed unimportant whether it was in fact necessary to make the mortgage, because, conceding that the evidence did not show such a necessity, the defense could not be availed of by the corporation, or by the purchaser, who bought with full knowledge of the trust deed. The case belongs to a class already explained. The corporation had the right to do the very thing complained of, and neither it nor the purchaser could set up that the requisite conditions for the exercise of the power did not exist.

In *Kadish v. Garden City Equitable Loan and Building Ass.* 151 Ill. 531, the court purposely avoided deciding whether corporations for manufacturing purposes could become

members of homestead and loan associations, and whether such an association could loan money for general business purposes. The corporation had a right to loan money and the loans were made to actual members. All that was insisted upon was, that the borrowers, though in fact members, were ineligible to membership, and the money was applied to general business purposes. It was held that the eligibility to membership could not be questioned nor the purpose for which the money was borrowed, and the term *ultra vires*, as there used and defined, did not embrace unlawful acts which the corporation could not perform as being different from the purpose of its organization and against the policy of the State.

In this case the transaction was beyond the corporate powers and *ultra vires* in the strict and legitimate sense, and against public policy. It could not be ratified or become valid by acquiescence, since there was no power to make it. Flora D. Bishopp, who dealt with the corporation, was chargeable with notice of its powers and their limitations and its inability to enter into the contract. She could not make the void contract valid by acting under it. No action can be maintained upon the unlawful contract, and in such cases, if the courts can afford any remedy, it cannot be done by affirming or enforcing the contract, but in some other manner.

The decree of the superior court against the National Home Building and Loan Association for any deficiency that may exist, and for execution to collect the same, and the judgment of the Appellate Court affirming said decree in that respect, are each reversed.

*Judgment reversed.*

Mr. JUSTICE CARTER, dissenting:

I do not agree to the doctrine announced in the decision of this case, that a corporation may not be estopped from pleading its own lack of corporate power. As I understand the decisions, it has long been the settled

doctrine of this court that where the contract has been wholly executed and the corporation has received the benefit of it, it will be estopped from setting up in defense of payment its own lack of power, under its charter, to enter into the contract, where the contract is not one either *malum in se* or *malum prohibitum*. I do not understand that the application of the doctrine of estoppel is confined to those cases where the contract is within the powers of the corporation, but only beyond the mere authority of its officers or agents. The doctrine of estoppel does not rest upon the principle of agency that there may be a ratification of the unauthorized acts of agents. It has been held, not only by this court but by many others, that in many cases the question of *ultra vires* can only be raised in a direct proceeding by the State to oust the corporation of its assumed and usurped powers. *Bradley v. Ballard*, 55 Ill. 413; *Kadish v. Garden City Building Ass.* 151 id. 531; *McNulta v. Corn Belt Bank*, 164 id. 427; *Eckman v. Chicago, Burlington and Quincy Railroad Co.* 169 id. 312; *Darst v. Gale*, 83 id. 136.

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PAUL H. KELLY

v.

CLARA PARKER *et al.*

181 49  
212 899

*Opinion filed June 17, 1899—Rehearing denied October 6, 1899.*

1. **WILLS**—*instrument not operative as a will unless executed with statutory formality.* An instrument in writing cannot pass title to property as a will unless signed and witnessed as required by section 2 of the act on wills.

2. **DEEDS**—*when instrument constitutes valid conveyance.* Under section 9 of the Conveyance act (Rev. Stat. 1874, p. 274,) an instrument in writing which designates a grantor and grantee, recites consideration, contains the usual granting words, and is sealed, signed and acknowledged as required by law, is a valid conveyance.

3. **SAME**—*when trust deed is not defeated by reservations.* A trust deed is not defeated because of reservations permitting the grantor to

use and control, improve and lease, the property during his lifetime, enjoy the rents and profits, devise, sell or convey the property and dispose of the proceeds in the manner specified in the trust provisions, and also to revoke the deed and the trusts and powers created thereby, where such reservations are incorporated in the deed to express the grantor's intention as to the trust upon which the conveyance was made.

4. *SAME—when deed is not void as testamentary.* A trust deed containing granting words *in presenti*, purporting to convey the premises to the grantees at the time the deed was executed, is not rendered testamentary because of reservations, trusts and conditions respecting the use of the property during the grantor's life.

5. *SAME—when deed is well delivered.* A trust deed delivered to a third party as agent for the grantees is well delivered, and passes title though not recorded until after the grantor's death, where the grantor parted with all control over the instrument and permitted it to remain undisturbed in the third party's possession; and this is true though the deed contained a clause permitting the grantor to revoke the instrument.

6. The court construes the instrument in question in this case and holds it is not testamentary. (MAGRUDER, J., dissents, holding the opposite view.)

**APPEAL** from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

SHOPE, MATHIS, BARRETT & ROGERS, (S. P. SHOPE, of counsel,) for appellant:

Our contention is that said instrument is void as a will because not executed and witnessed in the manner in which the statute requires wills to be executed. (Rev. Stat. chap. 148, sec. 2.) It is also void because it is testamentary in its character, and attempts a disposition of the property which could only be made by a will.

Though in the form of a deed, and intended by the parties to have that effect, an instrument will, if it vests no present interest but only appoints what is to be done after the death of the maker, be held to be testamentary. 1 Jarman on Wills, 18; 1 Redfield on Wills, 171, note 21; *Turner v. Scott*, 51 Pa. St. 126; *Ferguson v. Ferguson*, 27 Tex. 344; *Carlton v. Cameron*, 54 id. 77; *Wren v. Coffey*, 26 S. W. Rep. 142; *Bigley v. Souvey*, 45 Mich. 370; *Epperson v.*

*Mills*, 19 Tex. 67; *Leaver v. Gauss*, 62 Iowa, 314; *Burlington University v. Barrett*, 22 id. 60; *Leathers v. Greenacre*, 53 Me. 561; *Hester v. Young*, 2 Kelly, (Ga.) 31; *Kinard v. Kinard*, 1 Speer's Eq. 256; *Gillham v. Mustin*, 42 Ala. 365; *Reish v. Commonwealth*, 106 Pa. St. 521; *Johnson v. Sormans*, 69 Ga. 617; *Cunningham v. Davis*, 62 Miss. 366; *Mosser v. Mosser*, 32 Ala. 551; *Walker v. Jones*, 23 id. 448; *Massey v. Huntington*, 118 Ill. 80; *Roth v. Michalis*, 125 id. 325.

An instrument which is intended by a party to operate precisely as a will without being executed and witnessed as a will in accordance with the provisions of the Statute of Wills, will not be allowed to have the effect sought to be given it. *Walter v. Way*, 170 Ill. 104; *Cline v. Jones*, 111 id. 563; *Hayes v. Boylan*, 141 id. 400.

The instrument is void as a deed because no sufficient delivery was made. 1 Devlin on Deeds, sec. 282; *Stinson v. Anderson*, 96 Ill. 373; *Byars v. Spencer*, 101 id. 429; *Cline v. Jones*, 111 id. 566; *Wilson v. Wilson*, 158 id. 567; *Basket v. Hassell*, 107 U. S. 602; *Olney v. Howe*, 89 Ill. 556; *Provart v. Harris*, 150 id. 40; *Walter v. Way*, 170 id. 96; *Shea v. Murphy*, 164 id. 614.

Upon an instrument in form a deed but testamentary in character no trust can be created or arise. To create or raise a trust the property should pass absolutely to the trustee for the specific purposes, the grantor parting with all power of revocation and control. This cannot be so where the deed is testamentary in character, as the disposition of the property does not take effect until the grantor's death, and hence is within his control. 1 Perry on Trusts, (4th ed.) sec. 97; 2 Pomeroy's Eq. Jur. sec. 1001; 1 Lewin on Trusts, 58; *Massey v. Huntington*, 118 Ill. 81.

ULLMANN & HACKER, for appellees:

A delivery to an agent for the grantees is as effectual as if the deed had been delivered to the grantees personally. *Gunnell v. Cockerill*, 79 Ill. 79; *Mueller v. Meers*, 155 id. 284; *Baker v. Baker*, 159 id. 394; *Shea v. Murphy*, 164 id.

614; *Cline v. Jones*, 111 id. 566; *Wilson v. Wilson*, 158 id. 574; *Walter v. Way*, 170 id. 96.

The nature and quality of the interest granted by a deed are always to be ascertained from the instrument itself and are to be determined by the court, as a matter of law. The intention of the parties will control the court in the construction of the deed, but it is the intention apparent and manifest in the instrument, construing each clause, word and term involved in the construction according to its legal import and giving to each thus construed its legal effect. *Lekndorf v. Cope*, 122 Ill. 317.

The deed contains the granting words, "grant, bargain, sell, warrant, convey and assure," and all the parties to it intended it should be a deed of conveyance in trust, and it should be held to be such, unless some rule of law is found which will have the effect to prevent its operating as was intended. That the grant was made upon the conditions and reservations mentioned in the deed will not prevent the granting clause passing the title because inconsistent with the words of the grant. The rule of law is that the conditions and reservations that are inconsistent with the grant are void, and not the grant itself.

A life estate with power of alienation is not a fee or equivalent to a fee, unless the power is exercised by the life tenant. His estate in the land ceases with his death. Powers, however broad they may be, cannot, unexercised, enlarge a life estate into a fee simple.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This was a bill in chancery brought by Paul H. Kelly, the appellant, for partition of certain real estate in Cook county between himself and his sister, Clara Parker, as children and only heirs-at-law of James Kelly, deceased. The bill also prayed that an alleged deed executed by James Kelly on June 26, 1891, be set aside as a cloud on complainant's title.

There is no dispute between the parties in regard to the facts. They are as follows: For many years prior to 1891, James Kelly, of Cook county, Illinois, was the owner in fee of the following described real estate in Cook county: The west half of the north-west quarter of section 27, township 40, north, range 13, east of the third principal meridian,—except the railroad right of way owned by the Chicago and Northwestern Railroad Company. In June, 1891, Kelly was a widower and had two children living,—Paul H. Kelly, the complainant, and Clara Parker, (wife of James O. Parker,) his only heirs-at-law. The son, Paul H. Kelly, was married and had one daughter, Pauline G. Kelly, and the daughter, Mrs. Clara Parker, had one daughter, whose name was also Clara Parker. On June 26, 1891, James Kelly executed a deed, by which he attempted to convey said property to Clara Parker, his daughter, and Pauline G. Kelly, his granddaughter, as trustees, which instrument was as follows:

“This indenture, made this twenty-sixth day of June, 1891, between James Kelly, a widower, of the village of Winnetka, Cook county, Illinois, of the first part, and Clara Parker, wife of James O. Parker, of the village of Winnetka, and Pauline G. Kelly, of the city of Chicago, county of Cook and State of Illinois, of the second part:

“*Witnesseth*: That the said party of the first part, for and in consideration of one dollar to him in hand paid by the said party of the second part, the receipt whereof by said party of the first part is hereby acknowledged, and for other good and valuable considerations, by these presents does, subject to the reservations, conditions and trusts hereinafter expressed, grant, bargain, sell, warrant, convey and assure unto the said Clara Parker and Pauline G. Kelly, and to the successor in trust hereinafter provided for, their and her heirs, executors and assigns forever, all that certain piece or parcel of land situated in the county of Cook and State of Illinois, and described

as follows, to-wit: The west half of the north-west quarter of section twenty-seven (27), in township forty (40), north, range thirteen (13), east of the third principal meridian, (except the railroad right of way owned by the Chicago and Northwestern Railroad Company,) together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining,—to have and to hold to said party of the second part, to the successor in trust hereinafter provided for, their and her heirs, executors and assigns forever, in trust, nevertheless, for the following uses and purposes:

*"First*—During the life of said James Kelly to allow, suffer and permit him to use, occupy, manage, control, improve and lease, for any term or terms of years, said real estate, or any part thereof, in any manner and for any purposes he may desire, and to allow, suffer and permit the said James Kelly to have, use and enjoy all the rents, issues and profits of said real estate, or any part thereof, in the same manner as if he were the owner in fee simple thereof.

*"Second*—After the death of the said James Kelly, as soon as said trustees, and in case of the death of said Clara Parker, as soon as the said Pauline and the successor in trust hereinafter provided may deem advisable, to sell said real estate for cash or for part cash and part on time, to be secured by note or notes and mortgage or trust deed on said premises, as in the judgment of the said trustees, or in the judgment of the said successor in trust and said Pauline, in case of the death of said Clara Parker before such sale, may seem best, and out of the proceeds of such sale to pay: (a) any encumbrance of any nature which may then be on said premises, and any reasonable charge, expense or outlay for the care and improvement of said real estate which said trustees, or the said Pauline G. Kelly and said successor in trust, may deem advisable and necessary, and all proper expenses of this trust, which shall include reasonable fees for legal

advice; (b) the sum of \$10,000 to Clara Parker, of Winnetka, Cook county, Illinois, the granddaughter of said James Kelly, and to her issue in case of her death; if she should die without issue, then said \$10,000 shall be paid over to said Clara Parker, daughter of said James Kelly, and her heirs, as her and their own property forever; (c) the sum of \$10,000 to Pauline G. Kelly, of Chicago, Illinois, the granddaughter of said James Kelly, to have and to hold in her own right forever.

*Third*—The said Clara Parker, daughter of said James Kelly, shall retain one-half the remainder of said proceeds as her sole and exclusive property forever, and in case of her death before the division of said proceeds, then said one-half of said proceeds shall be paid to the heirs of said Clara Parker, daughter of said James Kelly.

*Fourth*—The remaining half of said proceeds shall be invested as said trustees, or in case of the death of said Clara Parker, said first trustee, as the said Pauline and said successor in trust may deem best, and the net interest and income to be used and expended by said trustees, or the said Pauline and said successor in trust, for the use and benefit of Paul H. Kelly and Mary Kelly, of Chicago, the parents of said Pauline, during their lives, and for the use and benefit during the life of the survivor of said Paul and Mary, with remainder over to said Pauline and her heirs, if she should survive both her said parents. If said Pauline should die without issue before the longest liver of said Paul and Mary, then said one-half of said remainder in this clause mentioned shall immediately thereupon vest in and be the property of said Clara Parker, wife of James O. Parker, and her heirs: *Provided, however,* that said interest and income thereof shall be paid to said Paul and Mary, as above provided, until the death of the longest liver of said Paul and Mary.

*Fifth*—Saving and reserving, nevertheless, unto said James Kelly full power and authority, during his natural life, to let, demise, mortgage, sell and convey said real

estate, or any part or portion thereof, upon such rents, considerations, terms, trusts, conditions and estates, in fee or any less estate or for years, and to such effect as he shall desire, and upon trust to permit him so to do, and to join him, said James Kelly, in the execution of each and every conveyance, conveyances and instruments in writing convenient or necessary to enable said James Kelly so to do, and all moneys and properties realized by the demise, mortgage or sale of said real estate, and of each and every part and parcel thereof, to suffer and permit said James Kelly to convey and dispose of in the same ways and manner as hereinbefore in this deed specified and provided with respect to the rents, issues and profits of said real estate.

*"Sixth*—Saving and reserving also to the said James Kelly full power and authority, at his option, by an instrument in writing executed under his hand and seal, to revoke this conveyance and all the powers and trusts hereby created, and require the said trustees or the said successor in trust, their or her heirs, executors and assigns, to re-convey said premises to him, the said James Kelly, or to convey the same to such person or persons as the said James Kelly may by said instrument in writing direct.

*"Seventh*—In case of the death of said Clara Parker, said first trustee, before the death of said Pauline, then said Pauline shall in that event have no power to do any act or thing under the terms of this deed except in conjunction with a successor in trust to be appointed as hereinafter provided. When a successor in trust shall be appointed as hereinafter provided, such successor shall act only in conjunction with said Pauline, except in case of the death of said Pauline, and, subject to this limitation, said successor in trust is hereby vested with all the rights, title, estate, duties, powers, trusts and obligations given by this instrument to said Clara Parker, said first trustee. If said Pauline should die before said Clara

Parker, said first trustee, then said first trustee shall have and exercise all the powers and duties hereby given to said trustees jointly.

*"Eighth*—Said Clara Parker, said first trustee, is hereby specially authorized and empowered, if she should so desire, by an instrument in writing under her hand and seal or by her last will and testament, to appoint a successor in trust to her, said Clara Parker, which said successor in trust, when so appointed, shall be and is hereby vested with all the rights, title, estate, duties, powers, trusts and obligations given by this deed to said Clara Parker, except as herein above limited, and shall be and is hereby authorized, in case of the death of said Pauline, to exercise all the powers and duties which he could jointly with said Pauline under this deed. If for any reason said Clara Parker, said first trustee, should fail to appoint, or should become incapable of appointing, said successor in trust, then said James Kelly authorizes any of said beneficiaries to apply to any court having jurisdiction of trusts, upon notice to the other beneficiaries and said Pauline, for the appointment of said successor in trust, and when such appointment shall have been made it shall have the same effect, and such successor shall have and be invested with all the powers, rights and estate, as if appointed by said first trustee, save and except that he shall first give bond in double the value of said trust estate, with surety to be approved by said court.

*"Ninth*—And the said Clara Parker and Pauline G. Kelly, party of the second part, do hereby covenant and agree to and with the said James Kelly, and his heirs and the beneficiaries herein above mentioned, that they and the said successor in trust will, and their and her heirs, administrators, executors and assigns shall, stand seized and possessed of and entitled to said premises, and each and every part thereof, and of the rents, issues, profits and avails thereof, which shall come unto their or

her hands upon the herein above expressed trusts, and none other.

"In witness whereof the said parties hereto have hereunto subscribed their names and affixed their seals the day and year first above written.

JAMES KELLY, [Seal.]  
CLARA PARKER, [Seal.]  
PAULINE G. KELLY. [Seal.]"

The deed was duly acknowledged before a notary public by all the parties, and was then delivered to Thomas G. Windes pursuant to the following memorandum in writing:

"This is to certify that on this first day of July, 1891, James Kelly, of Winnetka, Cook county, Illinois, has delivered to me a deed of trust, dated June 26, 1891, to Clara Parker, wife of James O. Parker, of Winnetka, and Pauline G. Kelly, of Chicago, Illinois, as trustees, a copy of which is hereto attached, and which deed, at the direction of said James Kelly and at the request of said trustees, is received and retained by me as agent for said trustees, and I shall place said deed on record in the recorder's office of Cook county, Illinois, upon the death of said James Kelly.

THOMAS G. WINDES.

"The above named Thomas G. Windes has this day received said deed in trust, as above stated.

JAMES KELLY,  
CLARA PARKER,  
PAULINE G. KELLY."

July 1, 1891.

The deed of June 26, 1891, remained in the hands of Thomas G. Windes from July 1, 1891, undisturbed, until after the death of James Kelly, in 1895, when the same was recorded by Windes and delivered by him to said trustees. On or about May 5, 1895, Kelly died, leaving him surviving no widow, but his children and only heirs-at-law, the complainant, Paul H. Kelly, and the defendant Mrs. Clara Parker. Kelly, the grantor, remained in possession and control of the property until his death.

On the hearing the court held that the instrument of June 26, 1891, was a valid deed, and entered a decree dismissing the bill, and the complainant appealed.

We have been furnished by counsel for appellant with an able brief and argument in support of their position, which, in view of the importance of the case, has been carefully considered.

It is first claimed that the instrument is void as a will because not executed and witnessed as required by the statute. Upon this point but little need be said. An instrument in writing in this State cannot pass title to property as a will unless signed and witnessed as required by section 2 of chapter 148 of the Revised Statutes. The instrument in question was not executed as wills are required by the statute to be executed, and it cannot be sustained as a will. Indeed, it is not claimed in the argument that the instrument is a will.

The second position of counsel is, that the instrument is void as a deed because it is testamentary in its character, and attempts a disposition of the property which could only be made by a will. The deed contains a grantor and a grantee. It recites a money consideration and other good and valuable considerations. It contains the granting words found in ordinary deeds of conveyance. It declares that the party of the first part "by these presents does, subject to the reservations, conditions and trusts hereinafter expressed, grant, bargain, sell, warrant, convey and assure unto the said Clara Parker and Pauline G. Kelly," their heirs, executors and assigns, forever. The deed was under seal, and acknowledged, as required by law, before a notary public. Our Statute of Conveyances, after providing a form for a deed, provides that "every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple to the grantee, his heirs and assigns." The deed, upon examination, will be found to contain all that is required to make a valid conveyance by the statute, and even more.

The instrument is, however, a deed in trust, and it is sought to defeat it as a deed on account of some of the

trust provisions incorporated in the instrument. These trust provisions are the first, fifth and sixth, wherein the grantor, James Kelly, is allowed to use, manage and control, improve and lease, the premises during his life, and enjoy the rents and profits; also with power, during his life, to devise, mortgage, sell and convey, with power and authority, at his option, to revoke the conveyance and all the powers and trusts thereby created. It is said that "everything the grantor attempted to convey was at the same time reserved during his life, as well as the express power to revoke the instrument itself." That construction, when all the provisions are considered, can not be placed on the instrument. The conditions and reservations incorporated in the deed, as was well said by the chancellor before whom the trial was had, were intended to express the intention of the maker of the trust upon which the conveyance was made. This is apparent, because in the very clause (the fifth) which contains the reservation to the maker of the right and power, during his natural life, to let, demise, mortgage, sell and convey, etc., the premises, it is expressly declared that the deed is "upon trust to permit him to do so." The conveyance of the property is an absolute one, but the grantor is allowed to do certain things incorporated in the reservations and conditions.

It is said the grantor did not intend that the deed should take effect until after his death. The deed contains no such provision. The words of the grant are *in presenti*, and where such is the case, upon a delivery of the deed the title to the premises will pass to the grantee. Had this deed declared that the title to the premises should not pass until the death of the grantor a different question might be presented. But such is not the language or import of the deed in question, but, on the other hand, it purports to convey the premises absolutely to the grantees at the time the deed was executed, subject

to certain reservations, conditions and trusts incorporated in the instrument.

A number of cases have been cited in the argument to establish the fact that the deed in question is testamentary, and consequently void. We have carefully examined these cases, but do not think that they sustain the position of counsel. The first case relied on is *Thorald v. Thorald*, 1 Phillim. 1. Upon an examination of that case it will be found that the instrument involved purported to give the property after the death of the grantor. So, also, in *Turner v. Scott*, 51 Pa. St. 126, the instrument involved provided that "this conveyance in no way to take effect until after the decease of the said John Scott, the grantor." In *Carlton v. Cameron*, 54 Tex. 77, the grantor, at the foot of the deed, incorporated this provision: "The said Abner Lee holding in reserve all the within named estates, both real and personal, during the natural life of said Abner Lee." This clause in the deed might properly be held as a qualification of the granting clause in the instrument. *Epperson v. Mills*, 19 Tex. 65, is somewhat like the present case, but there it was attempted to convey not only certain property which the grantor had, but such other property as he might acquire during his life, subject to certain limitations. Upon a careful examination of the case we think the fact was disclosed on the face of the deed that it was testamentary. In *Wren v. Coffey*, 26 S. W. Rep. 142, the deed in substance provided that the grantors did not intend it to take effect until the death of the grantors. In *Hester v. Young*, 2 Kelly, (Ga.) 31, on the gift of the property it was expressly provided that it should take effect after the death of the grantor and his wife. In *Kinard v. Kinard*, 1 Speer's Eq. 256, the grant of the property was only to take effect on the death of the grantor. In *Gillham v. Mustin*, 42 Ala. 365, a deed of gift was made in the event the grantor should be killed in the war, but if he should survive or return then the

instrument to be null and void. Under the deed, of course the title to the property did not pass. In *Mosser v. Mosser*, 32 Ala. 551, the instrument provided it should not take effect until after the death of the donor. *Walker v. Jones*, 23 Ala. 448, is also a case where, by the terms of the instrument, the gift was not to take effect until the death of the donor. In *Bigley v. Souvey*, 45 Mich. 370, the instrument was held to be testamentary, but it was so different from the one here involved that the case has no bearing here. *Leaver v. Gauss*, 62 Iowa, 314, is not in point, as the deed expressly provided the estate was only to commence on the death of the grantors. In *Massey v. Huntington*, 118 Ill. 80, the deed was sustained by this court as a valid instrument. In *Roth v. Michalis*, 125 Ill. 325, the deed was held to be testamentary, but there the instrument contained the following: "To have and to hold the said undivided half of my real and personal estate, money, claims and demands which I may leave at the time of my death, after the payment of my just debts, in trust for the heirs of my wife." Under this provision in the instrument it could not be held other than testamentary. But the ruling in that case cannot apply here. We have also been referred to *Pinkham v. Pinkham*, 55 Neb. 729, where a deed was held to be testamentary and invalid, but in that case the deed expressly provided, "this deed is to take effect and be in full force from and after my death," —that is, the death of the grantor. The case does not apply here, as the deed in question contains no such provision. Indeed, our attention has been called to no case where an instrument like the one in question has been held to be testamentary. We are aware of no case in this court where a deed like the one in question has been before the court for construction. But in *Shackleton v. Sebree*, 86 Ill. 616, a deed was involved containing covenants of warranty with the following provision: "This deed not to take effect until after my decease—not to be recorded until after my decease." The instrument was sustained

as a valid deed of conveyance. This case was followed and approved in *Harshbarger v. Carroll*, 163 Ill. 636. Other cases of a similar character have been cited, but it will not be necessary to refer to them here.

We are satisfied, after a careful consideration of the deed and its different provisions, that it was a valid deed, and that the title to the premises passed under it to the grantees therein, in trust for the purposes specified in the instrument.

It is next insisted that the deed was never delivered, and on that ground it is invalid. The deed was placed in the possession of Thomas G. Windes by the grantor on the first day of July, 1891,—three days after it was executed. Windes received the deed at the request of the trustees, and held the deed for them as their agent. It nowhere appears that the grantor had the right to recall the delivery of the deed to Windes for the trustees, nor did he have any control whatever over the deed after it was delivered into the possession of Windes. When Windes received the deed into his possession he did so for the trustees and as their agent. A delivery to an agent is a delivery to the principal, and the delivery was as binding and conclusive as if it had been made to the trustees in person. The fact that the deed was not to be recorded until the death of James Kelly did not affect its delivery. If authority to sustain the delivery in this case is needed, the following cases may be regarded as sufficient: *Gunnell v. Cockerill*, 79 Ill. 79; *Baker v. Baker*, 159 id. 394; *Walker v. Way*, 170 id. 96.

The judgment of the circuit court will be affirmed.

*Judgment affirmed.*

Mr. JUSTICE MAGRUDER: I think that the deed is testamentary and an attempt to evade the Statute of Wills.

## THE ROCHESTER LOAN AND BANKING COMPANY

*v.*JENNIE E. MORSE *et al.**Opinion filed June 17, 1899—Rehearing denied October 11, 1899.*

MORTGAGES—*partition of mortgaged property lying in two counties—effect of release upon lien created by decree.* A release as to a mortgagor's undivided interest in land in one county upon payment of the difference between the amount of the mortgage and the price paid by the mortgagee at a sale of the mortgagor's undivided interest in the land in the other county, which was embraced in the mortgage, does not bar the enforcement of a lien created by a subsequent partition decree, entered by consent of all parties interested, which sets apart to the mortgagor less than her share of the land in the county where the sale was had and gives her an increased portion of the land in the other county, and makes the certificate of sale a lien upon the land set apart to the mortgagor in severalty in both counties.

*Morse v. Rochester Loan and Banking Co.* 74 Ill. App. 326, reversed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of DuPage county; the Hon. C. W. UPTON, Judge, presiding.

The original bill in this cause was filed before April 14, 1896. On the latter date an amended bill was filed by the appellant banking company for the enforcement of a lien, decreed to it by a decree in a certain partition suit hereinafter mentioned, against certain lands of the appellee, Jennie E. Morse. The appellees filed an answer to the amended bill, and replication was filed to the answer. Upon hearing had, and after the introduction of testimony, oral and documentary, the circuit court made a decree, granting the relief prayed for in the amended bill. From this decree an appeal was prosecuted to the Appellate Court. The Appellate Court reversed the decree of the circuit court without remanding the cause. The present appeal is prosecuted from the judgment of the Appellate Court.

The facts are substantially as follows: On July 29, 1892, the appellee, Jennie E. Morse, was the owner in fee of one undivided one-fifth part of 440 acres of land in Will county and of 263 acres in DuPage county; and, on that day, she and her husband, the appellee, Frank Morse, executed a mortgage on her said undivided interest in the said lands to the appellant, the Rochester Loan and Banking Company, a corporation organized under the laws of New Hampshire, to secure a note for \$4000.00. On September 27, 1893, the banking company filed a bill to foreclose this mortgage in the circuit court of Will county against the land situated in that county, and also, on the same day, filed a bill to foreclose said mortgage in the circuit court of DuPage county against the land situated in the latter county.

On March 10, 1894, a foreclosure decree was entered in the suit in the Will county circuit court, and a sale of the premises situated in Will county was made under the decree of foreclosure on May 14, 1894. At such sale the appellant became the purchaser of said undivided interest for \$3080.00. On the same day a report of the sale was filed and approved, and a certificate of purchase was issued to the present appellant, the Rochester Loan and Banking Company.

The proportional share, which the appellant would obtain under the purchase of the land in Will county, would be equal to 88 acres undivided; and one undivided one-fifth part of the lands in DuPage county would be equal to 52.60 acres undivided.

While the foreclosure suits were pending in Will and DuPage counties, to-wit, on March 1, 1894, one Jennie Freeman, a tenant in common with Jennie E. Morse in the ownership of said lands, filed a partition bill in the circuit court of DuPage county for the partition of all the lands above mentioned, located in both Will and DuPage counties. The appellee, Jennie E. Morse, and the appellant, the Rochester Loan and Banking Company, were

both made parties defendant in this partition suit. The bill therein alleged, that Jennie E. Morse was the owner of an undivided one-fifth part of said premises, and that her interest was subject to the mortgage of the appellant banking company for \$4000.00, and interest thereon.

On April 4, 1894, an interlocutory decree of partition was entered in said partition suit, finding and adjudging that Jennie E. Morse was entitled to an undivided one-fifth interest in said premises in fee simple, subject to the mortgage of the appellant.

On June 16, 1894, the commissioners, appointed in the partition suit, filed their report, setting off and allotting to the appellee, Jennie E. Morse, in severalty for her interest and share of said premises, being one-fifth part thereof, 24.59 acres of the land in Will county and 120 acres of the land in DuPage county, describing the tracts thus allotted and set off by metes and bounds.

On September 22, 1894, a final decree was entered in the partition suit, confirming the report of the commissioners, and ordering that the parties should hold in severalty the shares set off and assigned to each respectively; that the title to the shares so set off should be vested in said parties respectively, and further finding, "that the lien of the mortgage, given by Jennie E. Morse and Frank Morse, her husband, \* \* \* to the Rochester Loan and Banking Company of Rochester, N. H., \* \* \* is a good and valid first lien on the shares and portions of the premises described in the decree, heretofore entered in this cause, which are set off by said commissioners, as shown by said report, to Jennie E. Morse, and that all other portions of said real estate are hereby decreed to be free from the lien and encumbrance of said mortgage; \* \* \* that on or about March 14, 1894, in a foreclosure proceeding begun under said described mortgage in the circuit court of Will county, Illinois, a sale of the undivided interest of said Jennie E. Morse in the premises, described in the decree heretofore entered

in this cause, was had, and the said interest of Jennie E. Morse in that portion of said premises, which are situated in Will county, was sold in pursuance of the decree, entered in said proceeding, to the \* \* \* banking company \* \* \* for the sum of \$3080.00, and a certificate of purchase at such sale was issued by order of said court to said purchaser; it is, therefore, ordered, adjudged and decreed by the court, that the certificate, so issued as aforesaid, shall be and remain a lien only upon the shares and portions of said premises, described in the decree heretofore entered in this cause, which vested and are set off by the report of said commissioners and this decree to said Jennie E. Morse; and that all other portions of said real estate described in said decree are hereby declared and decreed to be forever free from the lien and encumbrance of said certificate."

On August 30, 1894, the banking company executed a satisfaction piece or release of the said mortgage on the real estate, situated in the county of DuPage, containing about 263 acres, and acknowledged therein, that said mortgage "is redeemed, paid off, satisfied and discharged in so far as it relates to said lands in DuPage county, but not as to lands covered by said mortgage in Will county."

In the foreclosure suit, begun in September, 1893, in the circuit court of DuPage county for the foreclosure of the mortgage against the lands in that county, the answer of the present appellees was filed on August 31, 1894, and, by written stipulation between the parties filed therein on September 3, 1894, the bill was dismissed at the costs of the defendants.

On August 16, 1894, or thereabouts, the appellee, Jennie E. Morse, paid to the appellant banking company \$1694.42 in satisfaction and discharge of the amount, remaining due from Jennie E. Morse on said note and mortgage over and above the \$3080.00 that had been bid by the banking company on the sale by the master of the lands in Will county.

The lien, which the present bill was filed by the appellant to enforce, is the lien conferred by said partition decree, entered on September 22, 1894, upon the shares and portions of the premises, which were set off in the partition decree to the appellee, Jennie E. Morse.

JAMES H. MACOMBER, and DANIEL F. HIGGINS, for appellant.

BOTSFORD, WAYNE & BOTSFORD, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The record in this case presents a very curious state of facts. The mortgage, sought to be foreclosed, covered lands lying in two counties, to-wit, Will county and DuPage county. Two bills were filed about the same time, one in the circuit court of Will county to foreclose the mortgage against the lands lying in that county, and one in the circuit court of DuPage county to foreclose the same mortgage against the lands lying in DuPage county. In the Will county proceeding, decree of foreclosure was rendered, and sale was had, and one undivided one-fifth part of the 440 acres situated in Will county, being the interest of the appellee, Jennie E. Morse, in said lands, was struck off and sold to the appellant banking company for \$3080.00, and a certificate of purchase therefor issued to the company. An undivided one-fifth part of the 440 acres of land was 88 acres; and the undivided interest, thus amounting to 88 acres, was worth more than the amount bid for it and set forth in the certificate of sale.

The foreclosure suit, instituted in the circuit court of DuPage county, did not come to decree or sale, but was settled and dismissed before the entry of any decree therein. It was so settled and dismissed, because the mortgagors, Jennie E. Morse and her husband, paid to the company the sum of \$1694.42, being the amount due

to the company upon the mortgage over and above the \$3080.00 bid at the sale of the Will county land.

In the partition suit which was begun while both the foreclosure suits were pending, the court ignored the certificate of sale, held by the banking company upon the undivided 88 acres in Will county, owned by Jennie E. Morse, and set off to Jennie E. Morse, not the 88 acres of the Will county land and 52 acres of the DuPage county land, but 24.59 acres of the Will county land and 120 acres of the DuPage county land. The effect of this action was to take out of the operation of the certificate 63.41 acres of land in Will county.

Undoubtedly, the appellant company was entitled, after the expiration of the time of redemption, to a master's deed for the undivided one-fifth interest, amounting to 88 acres, of Jennie E. Morse in the Will county land, if the same should not be redeemed. The partition decree, however, did not give her full interest in the Will county land to Jennie E. Morse, but gave 63.41 acres thereof to tenants in common other than herself; and gave her an increased portion of the DuPage county land, to-wit, 120 acres.

The effect of a partition, in which a mortgagee is joined as a party, is to substitute for an undivided interest in the whole land the portion set off to the mortgagor in severalty; and the lien of the mortgage, which was theretofore upon an undivided interest, falls upon the particular portion so set off and aperted to the mortgagor. (*Loomis v. Riley*, 24 Ill. 307).

The banking company, holding the certificate of purchase, was a party defendant to the partition suit; and the court was there seeking to shift the titles of the several parties, so that it could make a specific decree, and settle the lien of the banking company upon the specific land allotted to Jennie E. Morse, and release it from those portions of the land, which were specifically set aside to the other owners.

It certainly would have been unjust to reduce the interest of Jennie E. Morse in the Will county land, purchased by the appellant, and take away from the appellant a large portion of its security, unless something should be given in the place of the part thus taken away. Appellant's certificate of sale called for what was equivalent to an undivided 88 acres of land located in Will county, but the portion set off to Jennie E. Morse in the partition suit was only 24.59 acres. To say that appellant should only have 24.59 acres subjected to the lien of its mortgage or certificate of sale in the partition suit, when it was entitled to 88 acres, would be to do palpable injustice. To avoid such a result the partition decree clearly provided, that the certificate of sale should be a lien upon the share of the premises set off to Jennie E. Morse, that is to say, upon the 24.59 acres of land in Will county and the 120 acres of land in DuPage county.

While, therefore, the partition decree released from the certificate at least three-fourths of its value, it gave to the mortgagor, Jennie E. Morse, an additional amount of land in DuPage county in place of that, which she held in Will county, and subjected such additional amount to the certificate of sale. The lien of the certificate was released from all the land in Will county not set apart to her, but at the same time it was made a lien upon the land set apart to her in both counties.

We are not concerned with the question, whether the court did right or wrong in entering such a decree, as was entered in the partition suit. The court there had jurisdiction of all the parties before it, both the mortgagors and the mortgagee; it had jurisdiction of the subject matter of the action; it had full and complete jurisdiction in partition, and the purpose of the decree was to ascertain the rights of the several parties, and shift their titles and liens upon the land before the court.

If there was any error, it was not a jurisdictional error, but one merely as to the merits of the case. The

partition decree has never been reversed, but stands and is in force. That decree was agreed to by all the parties in interest in the partition and in the land there involved.

The circuit court, in the case at bar, has found from the proof before it: "that said decree in partition so entered by this court \* \* \* was agreed upon by all parties in interest in said cause and in said land." This finding of the court is sustained by the evidence. The final decree in the partition suit was drafted and submitted to all the parties before it was entered.

In view of the fact, that the partition decree was entered by agreement, it makes little difference what effect the execution of a certificate of sale has upon the mortgage lien. It is immaterial here, whether the execution of the certificate released the mortgage lien or not. If, before the entry of the partition decree, the appellant company had challenged the right of the court to reduce its security in the manner above stated, a different decree may have been entered, but the proof shows that the appellant, coming into court with its certificate, and Jennie E. Morse, coming into court for the purpose of having a specific amount of land set apart to her, accepted the decree without any objections or exceptions. Therefore, the present appellees are estopped from complaining of the fact, that the partition decree gave to the appellant company a lien upon the lands in Will county and DuPage county, set off by that decree to Jennie E. Morse.

It is contended, however, by appellees, that the payment of \$1694.42 and the release of the mortgage upon the DuPage county land destroyed the lien of the appellant, and removed its right to claim under its certificate any of the DuPage county land, and any of the Will county land, except the 24.59 acres. To sustain this contention is to allow the appellees to take advantage of what, in the view presented by them, was either a mistake, or sharp practice.

The release of the mortgage, so far as it applied to the lands in DuPage county, was not intended by counsel for appellant as a release of the lien, provided for in the partition decree by an arrangement between himself and counsel for the complainant in the partition suit. The object of making the release and the stipulation to dismiss was to dispose of the mortgage foreclosure pending in DuPage county, on the theory that the partition suit would so affect the foreclosure in Will county, as that the master's certificate of sale would be of no use as a foundation of title, and that, when the court came to make its final decree, as it did on September 22, 1894, it would extend the lien of the certificate to each and every part of the real estate set apart specifically to Jennie E. Morse.

The release in question was executed and agreed to before the final decree in the partition suit was agreed upon and entered; and it did not operate, and was not intended to operate, as a release of appellant's claim upon the lands in DuPage county, which might be set off to Jennie E. Morse by the partition decree. On the contrary, that decree preserved to the appellant a lien upon the land, set off in severalty to her in that proceeding, for the payment of the amount still remaining unpaid upon the mortgage indebtedness.

We are of the opinion, that the judgment of the Appellate Court is erroneous, and that the decree, entered by the chancellor in the circuit court, correctly adjudicated upon the rights of the parties. Therefore, the judgment of the Appellate Court is reversed, and the decree of the circuit court is affirmed, and the cause is remanded to the latter court for the execution of its decree in pursuance of the terms thereof.

*Reversed and remanded.*

**In re APPLICATION OF HENRY M. DAY *et al.* FOR  
ADMISSION TO THE BAR.**

181	73
207	1100
208	2841

*Opinion filed June 19, 1899—Rehearing denied October 6, 1899.*

1. STATUTES—*retrospective operation is not favored in construing statutes.* If it is doubtful as to whether a statute was intended by the legislature to have prospective or retrospective operation, courts will construe it as being prospective only.
2. SAME—*the true office of a proviso is to qualify, and not to enlarge, the enacting clause.* The legitimate office of a proviso is to limit, restrain or qualify the enacting clause or except something from its operation, and not to enlarge the enacting clause by conferring substantial rights not therein granted.
3. ATTORNEYS AT LAW—*act of 1899, for admission to the bar, construed.* The provision of the act of 1899, on attorneys, (Laws of 1899, p. 81,) which specifies that applicants for admission to the bar shall be granted licenses who have complied with the rules of the Supreme Court in force at the time they began the study of law, notwithstanding subsequent changes, has prospective operation only, and is of no force as regards the change in Supreme Court rules made November 4, 1897.
4. SAME—*law regulating admission to bar must be general.* The right to practice law is a privilege, and any law which attempts to prescribe the conditions under which a license to practice law shall be granted must be general in its operation, and any classification adopted must have a reasonable basis and not be purely arbitrary.
5. SAME—*proviso to section 1 of act of 1899, on attorneys, is special legislation.* The proviso to section 1 of the act of 1899, on attorneys, which entitles the holder of a diploma of a law school having a two years' course, which shows that the holder began the study of law prior to November 4, 1897, to a license to practice law, is unconstitutional, being special legislation, based upon an arbitrary and unreasonable classification. (PHILLIPS and BOGGS, JJ., dissenting.)
6. SAME—*power to prescribe qualifications of attorneys is judicial.* An attorney is an officer of the court, and the power to prescribe the qualifications which will entitle an applicant for admission to the bar to a license is judicial, and not legislative. (PHILLIPS and BOGGS, JJ., dissenting.)
7. SAME—*right of legislature to regulate admission to the bar.* Under its general police power the legislature may prescribe reasonable conditions which will exclude from the right to practice law those persons through whom injurious consequences are likely to result to the inhabitants of the State.

8. **SAME—proviso to section 1 of act of 1899, on attorneys, is unconstitutional.** The proviso to section 1 of the act of 1899, on attorneys, which relates to the admission to the bar of holders of diplomas in law schools having a two years' course, etc., is in violation of article 3 of the constitution, concerning the division of governmental powers. (PHILLIPS and BOGGS, JJ., dissenting.)

#### APPLICATION for license to practice law.

HAMLINE, SCOTT & LORD, and WILLIAM BARGE, for applicants:

At common law, and now, the only way an advocate can become a member of the bar of England was and is by being called by the inns of lawyers of which he has become a member. *Weeks on Attorneys*, secs. 14-22.

The power of the English courts to admit attorneys is derived solely from statutes, and is not inherent. *Glanville*, b. 11, ch. 3; *Cooper's case*, 22 N. Y. 90; 1 Reeves, 169; 2 Inst. 249, 250; *Register of Writs*, 20, 22; *Bacon's Abr.* tit. "Attorney," pt. 1; *Coke's Litt.* 128a, sec. 196; *Petersdorff's Abr.* tit. "Attorney;" *Mirror of Justice*, 100, 249.

As to barristers: *Pearce's Inns of Court*, 60; 4 Reeves' *Hist. Eng. Law*, 573, 574; *Fortescue de Laudibus*, 180, 188; *King v. Benchers of Lincoln's Inn*, 4 B. & C. 855.

The power of clients to appoint attorneys and courts to regulate their admission is statutory. 2 Reeves' *Hist.* 285, 297, 169; 4 id. 76; 3 id. 233; 2 *Coke's Inst.* 250, 377, 378; *Becher's case*, 8 Co. 58; 12 Edw. II, ch. 1; 21 Edw. III, 41; 9 id. 6; 3 Edw. I, ch. 42; *Henry VII*, 27; 21 Hen. 30; 4 Inst. 101; 8 *Henry IV*, 62; *Fitz. N. B.* 60, 61, 63; 2 *Henry VI*, 11; 3 id. 55; 7 Edw. IV, 9a; 12 *Henry VII*, 9; *Dawson on Law of Attorneys*, introd. 7; *Maughan on Law of Attorneys*, 9; 1 *Roll*, 3; 4 *Henry IV*, ch. 18; 20 *Henry VI*, 372; *Crabbe's Eng. Law*, 351.

The legislature of Illinois in 1819 conferred the power to license upon two of the members of the Supreme Court and the power to disbar upon the full bench, and this source of power has been assumed by the legislature and

recognized by this court for eighty years. Acts of 1819, p. 9; Rev. Stat. 1845, p. 72; Rev. Stat. 1874, p. 169; Laws of 1833, p. 100.

A contemporaneous legislative construction of a constitutional provision is entitled to great deference. *Phœbe v. Jay*, Breese, 268; 4 Bacon's Abr. stat. 648; Sedgwick on Stat. and Const. Law, 412; *Cohens v. Virginia*, 6 Wheat. 264.

All power not delegated to the executive or judicial department is reserved to the legislative. *Field v. People*, 3 Scam. 79; *People v. Wilson*, 15 Ill. 391.

Neither the constitution of 1819, of 1845 or of 1870 invests the Supreme Court with the power of licensing attorneys or regulating admissions to the bar. The legislature, in declaring what shall constitute a person an attorney and entitle him to practice in courts of record, exercises the police power over which it has absolute control. *Robb v. Smith*, 3 Scam. 46.

The power of two judges to license is derived from the legislature, and is subject to be limited, changed or taken away by the legislature. *In re Bradwell*, 55 Ill. 535.

The power to disbar does not inhere in the courts, but is the creation of the legislature. The circuit courts have no such power, and had no power to suspend until 1874. Rev. Stat. 1874, sec. 6, p. 170; *Winkelman v. People*, 50 Ill. 449; *People v. Sanborn*, 1 Scam. 123; *In re Fellows*, 2 id. 369; *People v. Coe*, 84 Ill. 327; *People v. Palmer*, 61 id. 255; *People v. Goodrich*, 79 id. 148; *People v. Moutray*, 166 id. 630.

In other States the source of the court's power to license is recognized to be the legislature. *Cooper's case*, 22 N.Y. 67; *Ex parte Yale*, 24 Cal. 241; *Percy's case*, 36 N.Y. 651; *In the matter of an Attorney*, 83 id. 164; *In re Beggs*, 67 id. 120; *In re Thomas*, 16 Col. 441; *Commonwealth v. Judges*, 1 S. & R. 187; *In re Hall*, 50 Conn. 131; *In re Leach*, 134 Ind. 665; 3 Am. & Eng. Ency. of Law, (2d ed.) 287.

Cases cited to establish the inherent and exclusive power of the courts to admit and disbar are chiefly Federal cases. They do not support that proposition.

The statute is not special legislation. *Vogel v. Pekoc*, 157 Ill. 339; *People v. Wright*, 70 id. 308; *Hawthorn v. People*, 109 id. 302; *Potwin v. Johnson*, 108 id. 70; *Railway Co. v. People*, 144 id. 458; *Cummings v. Chicago*, id. 563; *Coughlin v. People*, id. 140.

BLEWETT LEE, and A. M. PENCE, for objectors:

The admission of attorneys is a part of the judicial power. Const. 1870, art. 3.

The history of admission to the bar: Maughan on Attorneys, 5, 10, 15-20, 55, 57; *Ricker's case*, 66 N. H. 207; 3 Blackstone's Com. 26, 28; 1 Pollock & Maitland's Hist. of Eng. Law, 190, 192, 194-196; Laws of N. W. Terr. 1792, p. 40, chap. 10, sec. 1; 2 Wilson's Works, (Andrews' ed.) 247; Laws of Indiana Terr. 1807, p. 162; Laws of Illinois Terr. (1st sess.) 5; 1 id. 58.

An attorney is an officer of the court. *Ex parte Garland*, 4 Wall. 333; *In re Bradwell*, 55 Ill. 535; 3 Am. & Eng. Ency. of Law, (2d ed.) 283; *Vise v. County of Hamilton*, 19 Ill. 78.

His admission is an act of *quasi* public character, to which any person may object. *Ex parte Walls*, 73 Ind. 95; *In re Burchard*, 27 Hun, 429.

His admission is a judicial act. 3 Am. & Eng. Ency. of Law, (2d ed.) 287; *Ex parte Secombe*, 19 How. 9; *Petition of Splane*, 123 Pa. St. 527; *Randall v. Brigham*, 7 Wall. 523; *Commonwealth v. Judges*, 1 S. & R. 187; Weeks on Attorneys, (2d ed.) 157; *Goodell's case*, 39 Wis. 232; *In re Mosness*, 39 id. 509.

Conversely, his disbarment is a judicial act. 3 Am. & Eng. Ency. of Law, (2d ed.) 300; 4 Henry IV, chap. 18; *Ex parte Robinson*, 19 Wall. 505; *State v. Judge*, 49 La. Ann. 1015; Weeks on Attorneys, (2d ed.) 154; *Moutray v. People*, 162 Ill. 194; *Missouri River Tel. Co. v. Bank*, 74 id. 217.

The legislature cannot constitutionally impair the judicial power. *Houston v. Williams*, 13 Cal. 24; *Vaughn v. Harper*, 49 Ark. 160; *Ex parte Griffiths*, 118 Ind. 83.

The same principle is applied in case of laws regulating punishment of contempt of court. 6 Am. & Eng. Ency. of Law, (2d ed.) 1048.

The appointment of assistants to the court cannot be controlled by the legislature. *State v. Noble*, 118 Ind. 850; 6 Am. & Eng. Ency. of Law, (2d ed.) 1047; *In re Janitor of Supreme Court*, 35 Wis. 410.

The act of February 21, 1899, is an assumption by the legislature of judicial power.

Rules of court are simply general orders. *Owens v. Ranstead*, 22 Ill. 161.

The legislature cannot prescribe conclusive rules of evidence. *Marks v. Hawthorne*, 148 U. S. 172; *Wantland v. White*, 19 Ind. 470; Cooley's Const. Lim. (3d ed.) 46; 6 Am. & Eng. Ency. of Law, (2d ed.) 1050; *Matter of Cooper*, 22 N. Y. 67.

The act of February 21, 1899, is special legislation, and denies the equal protection of the laws. Const. 1870, art. 4, sec. 22; U. S. Const. 14th amend. sec. 1; *Harding v. People*, 160 Ill. 459; *Railroad Co. v. Ellis*, 165 U. S. 150; *In re Burchard*, 27 Hun, 429.

LESSING ROSENTHAL, also for objectors.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

This is an application to this court for admission to the bar of this State by virtue of diplomas from law schools issued to the applicants. The act of the General Assembly passed in 1899, under which the application is made, is entitled "An act to amend section 1 of an act entitled 'An act to revise the law in relation to attorneys and counselors,' approved March 28, 1874, in force July 1, 1874." The amendment, so far as it appears in the enacting clause, consists in the addition to the section of the following: "And every applicant for a license who shall comply with the rules of the Supreme Court in regard to

admission to the bar in force at the time such applicant commenced the study of law, either in a law office or a law school or college, shall be granted a license under this act, notwithstanding any subsequent changes in said rules." The eminent counsel who have argued the motion for admission on behalf of the applicants say that this provision, and all of the section preceding the proviso hereinafter mentioned, is prospective in its nature, and that it concedes to this court the power to make and change rules for admission to the bar, but annexes the additional requirement that when it does change them in the future, any one who has commenced the study of law at the time of the change may have a license by complying with the rules for admission in force at the time such applicant commenced such study. They say that, so far as that provision goes, it means only that new rules hereafter made "must be prospective and must not affect so-called inchoate rights." In this position counsel are unquestionably correct. A retrospective operation is not favored, and a statute will be construed to have a prospective effect if such a conclusion is permissible. If the real design of the statute in that respect is doubtful it will be construed to have a prospective operation only, and a retrospective effect will not be given to it unless it clearly appears that such was the intention of the legislature. (*McHaney v. Trustees of Schools*, 68 Ill. 140; *United States Mortgage Co. v. Gross*, 93 id. 483; *People v. Peacock*, 98 id. 172; *Means v. Harrison*, 114 id. 248.) In this case no intention to make the enactment retrospective is expressed, but such an intention is clearly negatived by the attempt to legislate for those affected by the change already made under the form of a proviso. And further, if the enactment were retrospective, students to be examined would go to the Appellate Court, while the proviso sends them to the examining board. To hold it retrospective would make the proviso repugnant to it. The provision quoted, therefore, operates only as a rule for

the future, and does not confer the rights claimed on this application. The change in the rules for admission to the bar made November 4, 1897, and the rules themselves, are unaffected by that provision, and counsel for applicants rest their claim wholly upon the proviso following such provision. After said provision there is a double proviso, one branch of which is that up to December 31, 1899, this court shall grant a license of admittance to the bar to the holder of every diploma regularly issued by any law school regularly organized under the laws of this State whose regular course of law studies is two years and requiring an attendance by the student of at least thirty-six weeks in each of such years, and showing that the student began the study of law prior to November 4, 1897, and accompanied with the usual proofs of good moral character. The other branch of the proviso is that any student who has studied law for two years in a law office, or part of such time in a law office "and part in the aforesaid law school," and whose course of study began prior to November 4, 1897, shall be admitted upon a satisfactory examination by the examining board in the branches now required by the rules of this court. If the right to admission exists at all, it is by virtue of the proviso which, it is claimed, confers substantial rights and privileges upon the persons named therein and establishes rules of legislative creation for their admission to the bar. Now, the office of a proviso is to qualify or limit the enactment itself, and not to enlarge the enacting clause. "The office of a proviso, generally, is either to except something from the enacting clause, to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of its extending to cases not intended to be brought within its purview." (Potter's Dwarris on Statutes, 118, note 11.) It is intended to qualify what is affirmed in the body of the act, section or paragraph preceding it. (*Boone v. Juliet*, 1 Scam. 258; *Sarah v. Borders*, 4 id. 341; *Huddleston v. Francis*, 124 Ill. 195; *City of Chicago*

v. *Phœnix Ins. Co.* 126 id. 276; *Voorhees v. Bank of the United States*, 10 Pet. 449.) This proviso, instead of excepting something from the enactment or qualifying it in some way, attempts to enlarge the enactment to which it is appended and is designed to operate as a substantive enactment itself. That is not the legitimate office of a proviso. There is authority, however, for holding that the intention of the legislature, if plainly expressed, is to have the force of law although in the form of a proviso, and we will treat this proviso as an enactment in itself.

Considering the proviso as such an enactment, it is clearly special legislation, prohibited by the constitution, and invalid as such. If the legislature had any right to admit attorneys to practice in the courts and take part in the administration of justice, and could prescribe the character of evidence which should be received by the court as conclusive of the requisite learning and ability of persons to practice law, it could only be done by a general law, and not by granting special and exclusive privileges to certain persons or classes of persons. (Const. art. 4, sec. 22.) The right to practice law is a privilege, and a license for that purpose makes the holder an officer of the court, and confers upon him the right to appear for litigants, to argue causes and to collect fees therefor, and creates certain exemptions, such as from jury service and arrest on civil process while attending court. The law conferring such privileges must be general in its operation. No doubt the legislature, in framing an enactment for that purpose, may classify persons so long as the law establishing classes is general and has some reasonable relation to the end sought. There must be some difference which furnishes a reasonable basis for different legislation as to the different classes, and not a purely arbitrary one, having no just relation to the subject of the legislation. (*Braceville Coal Co. v. People*, 147 Ill. 66; *Ritchie v. People*, 155 id. 98; *Gulf, Colorado and Santa Fe Railroad Co. v. Ellis*, 165 U. S. 150.) The length

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of time a physician has practiced and the skill acquired by experience may furnish a basis for classification, (*Williams v. People*, 121 Ill. 84,) but the place where such physician has resided and practiced his profession cannot furnish such basis and is an arbitrary discrimination, making an enactment based upon it void. (*State v. Pennoyer*, 65 N. H. 113.) Here, the legislature undertakes to say what shall serve as a test of fitness for the profession of the law, and, plainly, any classification must have some reference to learning, character or ability to engage in such practice. The proviso is limited, first, to a class of persons who began the study of law prior to November 4, 1897. This class is subdivided into two classes: First, those presenting diplomas issued by any law school of this State before December 31, 1899; and second, those who studied law for the period of two years in a law office, or part of the time in a law school and part in a law office, who are to be admitted upon examination in the subjects specified in the present rules of this court; and as to this latter subdivision there seems to be no limit of time for making application for admission. As to both classes the conditions of the rules are dispensed with, and, as between the two, different conditions and limits of time are fixed. No course of study is prescribed for the law school, but a diploma granted upon the completion of any sort of course its managers may prescribe is made all-sufficient. Can there be anything with relation to the qualifications or fitness of persons to practice law resting upon the mere date of November 4, 1897, which will furnish a basis of classification? Plainly not. Those who began the study of law November 4 could qualify themselves to practice in two years as well as those who began on the 3d. The classes named in the proviso need spend only two years in study, while those who commenced the next day must spend three years, although they would complete two years before the time limit. The one who commenced on the 3d, if possessed

of a diploma, is to be admitted without examination before December 31, 1899, and without any prescribed course of study, while as to the other the prescribed course must be pursued and the diploma is utterly useless. Such classification cannot rest upon any natural reason or bear any just relation to the object sought, and none is suggested. The proviso is for the sole purpose of bestowing privileges upon certain defined persons. It is not a mere change of system at a given date, but it recognizes the change made and the power of the court to make future changes subject to a certain restriction, and legislates for a particular class. Students who began before and after November 4, 1897, were pursuing their studies when it was passed, and those who began after that date and before December 31, 1897, will complete two years before December 31, 1899, but cannot enjoy its privileges.

Another fatal objection to the provisions in question is that the legislature, in its enactment, overlooked the restraint imposed by the constitution and assumed the exercise of a power properly belonging to the courts. A provision which has been incorporated in each successive constitution of this State is found in the present constitution as article 3, in the following language: "The powers of the government of this State are divided into three distinct departments—the legislative, executive and judicial; and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." To this question the greater part of the argument of the learned counsel on each side has been directed, and the history of the exercise of such power in England has been very carefully set forth. That history is very interesting, but is of little benefit in determining whether the power is one properly belonging to courts or to the legislature. The difference in the principles underlying the systems of government

is such as to render a conclusion inapplicable even if it should be found that parliament had exercised such power. Judge Cooley, in his great work on Constitutional Limitations, points out that while it is natural that we should recur to the powers of parliament and incline to concede, without reflection, that whatever the legislature of the country from which we derived our laws could do might also be done by the legislative authority in this country, we should bear in mind the important distinction that parliament may exercise all the powers of government while the legislature can exercise but one. (Cooley's Const. Lim. 102.) He says further (p. 104): "So long as the parliament is recognized as rightfully exercising the sovereign authority of the country, it is evident that the resemblance between it and American legislatures in regard to their ultimate powers cannot be traced very far. The American legislatures only exercise a certain portion of the sovereign power. The sovereignty is in the people, and the legislatures which they have created are only to discharge a trust of which they have been made a depository, but with well-defined restrictions. Upon this difference it is to be observed, that while parliament, to any extent it may choose, may exercise judicial authority, one of the most noticeable features in American constitutional law is the care taken to separate legislative, executive and judicial functions. \* \* \* But the grant of the judicial power to the department created for the purpose of exercising it must be regarded as an exclusive grant covering the whole power, subject only to the limitations which the constitutions impose and to the incidental exceptions before referred to. While, therefore, the American legislatures may exercise the legislative powers which the parliament of Great Britain wields, except as restrictions are imposed, they are at the same time excluded from other functions which may be, and sometimes habitually are, exercised by the parliament." Whatever the English practice may have been,

the question must be what the nature of the power is, and whether it is one which naturally pertains to the courts. If it is judicial in its nature the legislatures are expressly prohibited from exercising it.

The history of the admission of attorneys in England, however, does not justify the claim that it is the exercise of the legislative function, but utterly refutes it. In that country the legal profession has been divided into classes which do not exist here. One class embraced what were known as attorneys when their practice was in the courts of common law, solicitors when it was in chancery, and proctors in the admiralty and ecclesiastical courts, all of whom at all times must have been admitted to the courts upon examination regarding their fitness, and this power no other department of government ever sought to control. Originally, no one could appear by attorney without the special warrant of the king, issuing out of chancery or under seal, granting the privilege. The king was considered the fountain of justice, and as he could not in person decide all controversies and remedy all wrongs, the injured parties were referred to the proper forum and writs were framed in his name to his judges. Suits were begun in that way; and when he granted the privilege in question it was as a part of that system and not in a legislative capacity. In a civilized country, where the rights of persons were to be determined in accordance with established rules, either statutory or promulgated by the courts, the employment of persons acquainted with those rules became a necessity both to the parties and the court. Persons unlearned in the law can neither aid a litigant nor the court, and parliament at different times extended the right of the litigant to appoint an attorney to represent him in court. (Maugham on Attorneys, appendix, 6, 7.) In 1292 Edward I made an order by which he appointed the lord chief justice of the court of common pleas and the rest of his fellow-justices of that court, that they, according to their discretion, should provide

and ordain from every county certain attorneys and apprentices, of the best and most apt for their learning and skill, who might do service to his court and people, and those so chosen only, and no other, should follow his court and transact the affairs thereof, the said king and his counsel then deeming the number of seven score to be sufficient for that employment, but it was left to the discretion of the said justices to add to that number or diminish, as they should see fit. (1 Pollock & Maitland's History of English Law, 194; Dugdale's Orig. Jurid. 141.) The profession of attorney was placed under the control of the judges, and the discretion to examine applicants as to their learning and qualifications and to admit to practice was exercised from that day by the judicial department of the English government, and no legislation sought to deprive the court of the power in that respect or to invest it in any other branch of the government. Parliament legislated upon the subject, but the legislation was of a character to exclude persons unfit to practice, who threatened the public welfare through ignorance or untrustworthiness. The statutes always recognized that the admission of attorneys was a matter essentially belonging to the courts and a matter of judicial discretion, and only sought to protect the public against improper persons. The first of these acts was the 4 Henry IV, c. 18, passed in 1403. The attorneys had increased to the number of two thousand, and the act, reciting that damages and mischiefs ensued from the great number of attorneys unlearned in the law, ordained and established that all attorneys should be examined by the justices, and by their discretion their names put in the roll and the other attorneys put out by the discretion of said justices, and their masters for whom they were attorneys should be warned to take others in their places, so that in the meantime no damage or prejudice should come to their said masters. (Maugham on Attorneys, app. 9.) In 1413, by 1 Henry V, under-sheriffs, sheriffs, clerks, receivers and bailiffs were

excluded from practicing as attorneys, because "the king's liege people dare not pursue or complain of the extortions and of the oppressions to them done by the officers of sheriffs." In 1455, by the 33 Henry VI, c. 7, parliament limited the number of attorneys for Suffolk, Norfolk and Norwich, reciting that the number had increased more than eighty, "most of whom, being not of sufficient knowledge, came to fairs, etc., inciting the people to suits for small trespasses." In 1606, by the 3 James I, c. 7, it was attempted to further regulate attorneys to the same end. (Maugham on Attorneys, app. 13.) Parliament did not, by any of these acts, undertake to determine the amount of learning which would qualify a person for admission. The courts, from time to time, made their rules regulating the admission of attorneys, and on occasion provided for the appointment of a committee or board of examiners. (Maugham on Attorneys, app. 14, 16.) Blackstone says (3 Com. 26): "These attorneys are now formed into a regular corps. They are admitted to the execution of their office by the superior courts of Westminster Hall. \* \* \* No man can practice as an attorney in any of those courts but such as is admitted and sworn an attorney of that particular court. An attorney of the court of king's bench cannot practice in the court of common pleas, nor *vice versa*. \* \* \* So early as the statute 4 Henry IV, c. 18, it was enacted that attorneys should be examined by the judges and none admitted but such as were virtuous, learned and sworn to do their duty."

It is argued that the power to admit is legislative, because the similar power to disbar was granted by an act of parliament. By the statute 3 Edward I, c. 28, it was provided that if any counsel should be guilty of deceit or collusion in the king's court he should be imprisoned for a year and a day, and thenceforth should not be heard to plead in that court for any man. (3 Blackstone's Com. 29; Weeks on Attorneys at Law, sec. 14.) This no more tends to show that the power is legislative

than the fact that the legislature provides punishment for stealing shows that the trial and conviction of a thief are a legislative proceeding. It is a function of the legislature to fix punishment for transgressions against the public, and disqualification for office or the deprivation of a license is not infrequently annexed to such punishment. Neither does it follow because this court has at different times mentioned the statute as authorizing a disbarment proceeding that such a proceeding is legislative, or that the legislature might either disbar an attorney or prescribe a conclusive rule of evidence against him. The legislature provides for the punishment of misdemeanors and that a person charged with such offense shall be tried by some court, but the trial in the court is a judicial proceeding, and whether he shall be found guilty or not is beyond the control of the legislature. This court has "an inherent right to see that the license is not abused or perverted to a use not contemplated in the grant," (*People v. Goodrich*, 79 Ill. 148,) and courts, in the absence of a statute, have inherent and summary jurisdiction over attorneys practicing at their bars. *Moutray v. People*, 162 Ill. 194.

The other class of professional practitioners in England were those who gave counsel in legal matters and conducted causes in courts as advocates. They came to the bar through the inns of court. These were colleges in which students resided and pursued their studies from a very early date. Lawyers gathered about the court at Westminster and *hospitia curiæ* were established, which were occupied by the lawyers and contained schools of law. On the suppression of the Knights Templars the pope granted their estates to the Knights Hospitalers of St. John of Jerusalem, who leased the buildings in London to the students of the law. The place was called "The Temple," from its former occupants, and the societies of the inner temple and middle temple were formed. The buildings included the inner temple and the middle tem-

ple, and there were added Lincoln's Inn, on the site of a palace of an earl of Lincoln, and Gray's Inn, the former residence of the Lords Gray of Wilton. After the suppression of the Knights Hospitalers by Henry VIII the society held the temple buildings of the crown by lease, and in 1608 they were granted by letters patent of James I to the chancellor of the exchequer, (a judicial officer,) the recorder of London and the benchers and treasurers of the inner and middle temples, for "lodging, reception and education of the professors and students of the law." At these inns the students of law attended in great numbers and were instructed in the law and practice. From time to time rules were made for the government of these inns by the judges, or with their concurrence and the advice and consent of the king or queen and the benchers or societies themselves. (Dugdale's *Orig. Jurid.* 312, 316, 317, 320.) The societies submitted for ages to be governed by the rules so made, and in every instance their conduct was subject to the control of the judges as visitors. They were voluntary societies, to which *mandamus* would not lie, but the ancient and usual way of redress for any grievance was by appealing to the judges. (*Boorman's case*, Marsh. 177; *King v. Gray's Inn*, 1 Doug. 353; *King v. Benchers of Lincoln's Inn*, 4 B. & C. 855.) The origin of their power to call to the bar is lost in the past, but they acted substantially as a board of examiners, subject to the control of the judges as visitors, and their act was accepted by the courts. The time of study was reduced from longer periods to five years before any student could be called to the bar, unless he was a master of arts or a bachelor of laws of the University of Oxford, Cambridge or Dublin. In their case it might be diminished to two years. He was then called a barrister. In the old books they were styled "apprentices," as in the foregoing order of Edward I, and were not qualified to execute the full office of an advocate until they were of sixteen years' standing, (3 Blackstone's

Com. 27,) when they might be advanced to the degree of sergeant. The benchers of the inn, who governed the society, were elected from the barristers according to seniority. There is nothing in all this which tends to support the view that the admission of any class of the legal profession was ever regarded as a legislative act.

In this country the courts of the United States have always controlled the admission of attorneys. The first Congress recognized their power in that respect and they have always retained it. The Federal judges have always required attorneys to be admitted to their respective courts. Admission to the Supreme Court of the United States does not confer the right to practice in the district and circuit courts. In *Ex parte Secombe*, 19 How. 9, on application for *mandamus* to the judges of the Supreme Court of the territory of Minnesota to restore petitioner to his office as attorney, the court said: "And it has been well settled by the rules and practices of common law courts that it rests exclusively with the courts to determine who is qualified to become one of its officers as attorney and for what cause he ought to be removed, \* \* \* and we are not aware of any case where a *mandamus* was issued to an inferior tribunal commanding it to reverse or annul its decision, where the decision, in its nature, was a judicial act and within the scope of its jurisdiction and discretion." In the case of *Ex parte Garland*, 4 Wall. 331, the court, holding the test oath for attorneys to be unconstitutional, explained the nature of the attorney's office as follows: "They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. It has always been the general practice in this country to obtain this evidence by an examination of the parties. In this court the fact of the admission of such officers in the highest court of the States to which they respectively belong, for three years preceding their application, is regarded as sufficient evidence of the possession of the

requisite legal learning and the statement of counsel moving their admission sufficient evidence their private and professional character is fair. The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counselors and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court, after opportunity to be heard has been afforded. (*Ex parte Heffron*, 7 How. (Miss.) 127; *Fletcher v. Dangerfield*, 20 Cal. 430.) Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power, and has been so held in numerous cases. It was so held by the court of appeals of New York in the matter of the application of Cooper for admission. (*Matter of Cooper*, 22 N. Y. 81.) 'Attorneys and counselors,' said that court, 'are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature, and hence their appointment may, with propriety, be entrusted to the courts, and the latter, in performing this duty, may very justly be considered as engaged in the exercise of their appropriate judicial functions.' In 3 Am. & Eng. Ency. of Law (2d ed. 287) it is said: "But the admission of an applicant to practice is a judicial act, and the attorney, when admitted, is an officer and member of the court. The legislature has no power, therefore, to provide that any person possessing certain qualifications must be admitted. It cannot assume judicial powers, and in every case the courts are vested with discretion as to whether any applicant is entitled to admission." In Wisconsin the statute commanded the court to admit as counselors such persons as were counselors of the State of Illinois. On the motion of a resident of Illinois for admission the power of the legislature to enact

such a statute was denied, on the ground that the court must be able to control its officers. (*In re Mosness*, 39 Wis. 509.) See, also, *Petition of Splane*, 123 Pa. St. 527. In the State courts the power of the legislature to prescribe the amount of learning upon which the court must admit to the practice of law has never been recognized, so far as counsel have discovered, with the single exception of *Matter of Cooper*, 22 N. Y. 67, quoted from by the Supreme Court of the United States in *Ex parte Garland, supra*. In that case the legislature enacted a statute admitting to practice on diploma of the Columbia College, and it was held that the act was valid.

Counsel for applicants in this case contend that the subject is legislative and not judicial in its character, and the act of admission is ministerial. Their chief reliance is that case of Cooper. The first question there considered by the court of appeals was whether the admission of attorneys was a judicial proceeding. The Supreme Court had denied admission and Cooper had appealed. It was suggested that the power of admitting attorneys was executive or administrative rather than judicial, and this objection, if well founded, would be fatal to the appeal. Upon a full consideration of that question it was held that the admission of attorneys was a judicial proceeding and the exercise of an appropriate judicial function. The appeal was entertained on that ground. The power being judicial in its nature, our constitution prohibits its exercise by the legislature. The court based its decision upon the ground that although the appointment of attorneys had usually been entrusted in that State to the courts and was judicial in its nature, yet it was not a necessary or inherent part of their judicial power, but was subject to legislative action and had been derived from statute. In that State the power to admit to practice was exercised before the revolution by the Governor. By the constitution of 1777 the appointment of attorneys was given to the courts, but the pro-

vision was dropped from the constitution of 1846, which provided: "Any male citizen of the age of twenty-one years, of good moral character and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this State." In view of the history of admission and this particular condition of affairs the act was sustained. The consequences have been greatly deplored by eminent men abundantly able to judge of the injustice to the public resulting from the rule then established, under which other special laws were passed.

This court has never acknowledged the power of the legislature to prescribe the amount of learning which shall qualify an attorney to practice in our courts. Section 3 of the same act to which the provision in question is an amendment, and which is the same as section 10 of the act of 1845, has always provided that "any person producing a license or other satisfactory voucher proving that he hath been regularly admitted an attorney at law in any court of record within the United States, and obtaining a certificate of good moral character, as required in the preceding section, may be licensed and permitted to practice as a counselor and attorney at law in any court in this State without an examination." Each State has its own rules, and in some States inferior courts of record are permitted to grant licenses and in others the requirements have always been below ours. The effect of enforcing such a statute would be to degrade the profession and fill its ranks with those not qualified by our rules. This court has refused to recognize that section as valid, and has required that the course of study in the other State shall be at least equal to that prescribed by our rules, or that the applicant should have been engaged in active practice under the license for a specified period. Again, the statute has always provided that the license may be obtained from some two justices of this court, while the rules have required that the mo-

tion shall be made to and granted by the court. Two justices are a minority, and not a court, and no motion to admit has been granted except by a majority of the court. In *Dahnke v. People*, 168 Ill. 102, we held that although it was the duty of the county board to erect and keep in repair a suitable court house, when the board has provided rooms they are under the control of the courts. We said (p. 109): "It rests with the judges of the courts to arrange among themselves how they will occupy the several court rooms thus provided for them by the county board. The county board has no right to dictate to the judges as to what particular room each judge shall occupy. To make the judges of our courts depend upon a legislative or political body for the rooms in which they shall hold their sessions, in the manner indicated in this record, would be to destroy the dignity and independence of the judiciary." The courts have an undoubted right to order and control their court rooms and to maintain their independence as a branch of the government. Each department of the government derives its power from the same source, and each is of equal dignity and independence under our constitution. In Wisconsin it was held that the judicial power extended to the selection of the court's own janitor, and in its separate and independent sphere of action the power could not be taken from the court and given to the legislative or executive department or any officer of either. *In re Janitor Supreme Court*, 35 Wis. 410.

None of the decisions of this court cited by counsel for applicants touch this question in any way. With the exception of two cases they are proceedings for the disbarment of attorneys, and the power of the legislature to protect the public against persons unfit to practice law, and to pass laws for that purpose, has never been denied. One of the remaining cases is *Robb v. Smith*, 3 Scam. 46, relating to the right of one not admitted by the court as an attorney to commence or prosecute a suit.

for another, and is of the same class. One case only is an application for admission, and that is the case of the late Myra Bradwell. (*In re Bradwell*, 55 Ill. 535.) There the court spoke of the attorney holding his commission from two members of the court; but the decision was the decision of the court, and not of two justices. The application was considered and denied by the court, as such, because the legislature had, in effect, prohibited her from practicing law. The court passed on her legal acquirements and said it was satisfied with her learning and ability. The court did not concede the power of the legislature to decide that question. It was held that the court should not admit any person or class of persons not intended by the legislature to be admitted. It was said that if the legislature should choose to remove the existing barrier the court would cheerfully issue licenses equally to men and women. After an amendment providing that no person should be refused a license on account of sex a license was granted to her. The legislature did not undertake, by the amendment, to deprive the court of passing upon her learning and fitness to practice law. That power belongs to the court by virtue of its being a court of justice and one of the departments of State into which, under the constitution, the power falls. Without such power, by which the courts can protect themselves against ignorance and want of skill, they cannot properly administer justice. The doctrine of that case is the same as of the others. It was competent for the legislature to remove the barrier and to protect Mrs. Bradwell in her civil rights against discrimination on account of sex.

In any consideration of the question it must not be forgotten that restrictions upon the privilege of practicing law are created only in the interest of the public welfare, and neither for nor against the student. No one who has commenced preparation has any inchoate right on account of that fact, but is bound to furnish the test of

fitness required when he asks to enter upon the practice. It is not contended by learned counsel for applicants that there is any right, either vested or inchoate, but it is claimed that the legislature may assume control over the subject because it falls within the police power. It may be readily admitted that such all-pervading power does, in some respects, reach the practice of the law and gives to the legislature some power concerning it. The legislature may enact police legislation for the protection of the public against things hurtful or threatening to their safety and welfare. So long as they do not infringe upon the powers properly belonging to the courts they may prescribe reasonable conditions which will exclude from the practice those persons through whom injurious consequences are likely to result to the inhabitants of the State. The proviso in this case bears upon its face no such object, but practically concedes the wisdom of a change in the rules and that such change is in the public interest, and attempts to give particular persons the privilege of admission based upon some fancied right accruing on account of the time when they commenced the study of the law. Parliament and the legislature have always required that persons to be admitted should have certain qualifications and fulfill certain requirements. They have properly excluded persons whom they deemed unfit, but, with the single exception above named in New York, have not forced the admission of any one. It would be strange, indeed, if the court can control its own court room, and even its own janitor, but that it is not within its power to inquire into the ability of the persons who assist in the administration of justice as its officers.

Counsel, however, say that the power is not one pertaining to courts, or else each circuit court would have a right to admit to practice. The circuit courts do have such power, even under the statute, as to attorneys residing in other States desiring to appear and try a cause in a court of this State. Section 12 of the act in ques-

tion provides for such foreign attorney being admitted to practice in the several courts of law and equity in this State upon the same terms as attorneys residing in this State are admitted in the other State. If an attorney of a sister State appears in one of our courts he procures no license in this court, but is admitted to the bar for that case by the court in which he appears, under the statute and on the principle of comity. The power, in such case, has always rested in the particular court and still rests there. The court where the case is pending grants leave *ex gratia* for the occasion. (*In re Mosness, supra.*) It may also be conceded that each court originally had the right to admit to practice at its own bar, but at a very early date a provision was made for a general license to be granted by this court, and the power to admit generally has never been exercised by the circuit courts. In the absence of such a provision the requirements might be different in the various courts of the State, and it was a legitimate provision to secure uniformity as well as to obviate the necessity of applying to each court where one might desire to practice. For eighty years the courts have recognized the exercise of that power by the Supreme Court, and the regulation in that respect has established the law for this State. The fact that circuit courts do not exercise the powers of this court does not establish the claim that such powers are not judicial.

The function of determining whether one who seeks to become an officer of the courts and to conduct causes therein is sufficiently acquainted with the rules established by the legislature and the courts governing the rights of parties and under which justice is administered pertains to the courts themselves. They must decide whether he has sufficient legal learning to enable him to apply those rules to varying conditions of fact and to bring the facts and law before the court so that a correct conclusion may be reached. The order of admission is the

judgment of the court that he possesses the requisite qualifications, under such restrictions and limitations as may be properly imposed by the legislature for the protection and welfare of the public. The fact that the legislature may prescribe the qualifications of doctors, plumbers, horseshoers and persons following other professions or callings not connected with the judicial system, and may say what shall be evidence of such qualifications, can have no influence on this question. A license to such persons confers no right to put the judicial power in motion or to participate in judicial proceedings. The attorney is a necessary part of the judicial system, and his vocation is not merely to find persons who are willing to have lawsuits. He is the first one to sit in judgment on every case, and whether the court shall be called upon to act depends on his decision. It is our duty to maintain the provision of the constitution that no person or collection of persons, being one of the departments of the government, shall exercise a power properly belonging to another, and if the legislature by inadvertence, as in this case, assumes the exercise of a power belonging to the judicial department, it should only be necessary to call its attention to the restraint imposed by the constitution.

Whatever may have been the propriety of the rule admitting the holder of a diploma issued by a law school to practice, in view of the law schools existing at its adoption, the rule had become an alarming menace to the administration of justice. The legislature of New York, by the statute above referred to, only sought to admit the graduates of a great university who had been examined by eminent lawyers, but under our rule persons were admitted who had been only nominally in attendance for the stipulated period of time upon schools of a very different grade. There was no State supervision of law schools, and any person who saw fit could organize a law school, and by advertising that the diplomas admitted to

the bar could obtain students. The language of the proviso, "any law school regularly organized under the laws of this State," is mere sound and means nothing. Anything in the form of a law school is regular, so far as the laws of this State are concerned. In view of the disastrous consequences to the profession and the public, the rule by which it was only a step from the diploma mill to the bar was changed, and, in an effort to discharge a duty to the public, the general standard of admission was raised. That the change was a wise one and that it will tend to promote the public welfare is not denied by counsel for applicants, who desire to elevate the standard of the bar and assure us that they sympathize with us in our efforts in that direction. It is conceded that when the rule was made, November 4, 1897, the court had full power to make it and to fix the standard of admission. It was a valid rule of the court acting within its unquestioned jurisdiction, and the question is whether the legislature could rightfully encroach upon a power belonging to the judicial department and set aside the rule. The constitution answers the question in the negative.

The motion to admit the applicants by virtue of their diplomas is denied.

*Motion denied.*

Mr. JUSTICE PHILLIPS, dissenting:

The applicants hold diplomas from law schools, which are produced in open court, together with certificates of good moral character, and a motion is entered by an attorney of this court to admit them to practice.

Prior to November 4, 1897, under rule 47 of this court, then in force, the holder of a diploma from a recognized law school of this State was admitted to the bar on producing a certificate of good moral character and presenting such diploma. On November 4, 1897; this court adopted new rules of practice, and by section 39 thereof this court appointed a State Board of Law Examiners, whose duties were defined and the subjects in which ap-

plicants for admission to the bar should be examined were prescribed. The rule also required satisfactory proof of preliminary general education, and that the applicant should furnish evidence that he had pursued a course of law studies for three years in a law school or office, and all applicants, other than the bearers of foreign licenses, were required to be examined by said board, and on its certificate of qualification admission to the bar and the issuance of a license were authorized. The petition of the applicants in this case shows that they had begun the study of the law under the rules in force prior to November 4, 1897, and expected to be admitted on compliance therewith. The rules adopted November 4, 1897, went into effect immediately on their adoption. By an act approved February 21, 1899, entitled "An act to amend section 1 of an act entitled 'An act to revise the law in relation to attorneys and counselors,' approved March 28, 1874, in force July 1, 1874," it was provided as follows:

"Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That section 1 of an act entitled 'An act to revise the law in relation to attorneys and counselors,' approved March 28, 1874, and in force July 1, 1874, be amended so as to read as follows:

"Sec. 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That no person shall be permitted to practice as an attorney or counselor at law, or to commence, conduct or defend any action, suit or plaint in which he is not a party concerned, in any court of record within this State, either by using or subscribing his own name or the name of any other person, without having previously obtained a license for that purpose from some two of the justices of the Supreme Court, which license shall constitute the person receiving the same an attorney and counselor at law, and shall authorize him to appear in all the courts within this State and there to practice as an attorney and counselor at law, according to the laws and customs thereof, for and

during his good behavior in said practice, and to demand and receive fees for any services which he may render as an attorney and counselor at law in this State. No person shall be refused a license under this act on account of sex, and every applicant for a license who shall comply with the rules of the Supreme Court in regard to admission to the bar in force at the time such applicant commenced the study of law, either in a law office or at a law school or college, shall be granted a license under this act, notwithstanding any subsequent changes in said rules: *Provided*, that to date of the 31st day of December, A. D. 1899, a diploma regularly issued by any law school regularly organized under the laws of this State, whose regular course of law studies is two years and requiring an actual attendance by the student of at least thirty-six weeks in each of such years, shall be received by the Supreme Court of this State, and a license of admittance to the bar shall thereupon be granted by the said court to the holder of such diploma; but every application for admission to the bar made on behalf of any person to whom any diploma, as aforesaid, has been awarded, must be made in term time, by motion of some attorney of the said court, supported by the usual proofs of good moral character, and the production in the said court of such diploma, or satisfactorily accounting by the applicant for its non-production; and in all cases when the diploma on which the application is based does not recite all the facts requisite to its reception, all such omitted facts must be shown by the affidavit of the applicant, or some officer of the law school, or by both.'

"Whereas an emergency exists, therefore this act shall take effect and be in force from and after its passage."

Under this act the applicants present their applications for admission to the bar, and objection is made by members of the bar who appear in behalf of bar associations and as *amici curiae*, who urge that the act is unconstitutional; that as an attorney is an officer of the

court his admission is an act of *quasi* public character, to which any person may object; that the admission of an attorney is a judicial act and a part of the judicial power; that the legislature cannot constitutionally impair the judicial power, and the act of February 21, 1899, is an assumption of such power and is special legislation denying the equal protection of the law, and hence not binding on the court.

The legislation of this State with reference to the admission of attorneys is by the act of February 10, 1819, which was substantially re-enacted in 1833 and is to the same effect as that found in the Revised Statutes of 1845 and 1874. By that legislation a person is prohibited from practicing as an attorney in any court of record without having obtained a license from some two of the justices of the Supreme Court, and such license shall constitute him an attorney at law and authorize him to appear in all courts of record in Illinois to practice as an attorney for and during his good behavior. The statute authorizes the justices of the Supreme Court to strike the attorney's name from the roll for misconduct in office, and gives to the Supreme Court and circuit courts power to punish, in a summary way, any attorney who may be guilty of contempt. By this legislation no court but the Supreme Court could license an attorney nor could any other court disbar him. The power to license being withheld from the circuit court, which is a court of general jurisdiction, it cannot be said that the power to license is a purely judicial act.

The power conferred upon the Supreme Court to license, by the legislature, which assumed control over the whole subject of admissions to and dismissals from the bar, has been recognized and acted upon by this court from the earliest legislation on this subject in this State, and has been treated as the source of this court's power to act with reference to these subjects. In the case of *Robb v. Smith*, 3 Scam. 46, a motion was made by the ap-

pellant to dismiss the suit because the papers were not signed by the plaintiff himself or any attorney of the court, as required by section 1 of the acts of 1819 and 1833. This case came up in 1841, and it was held with reference to this motion: "This is a point upon which we have but little authority, and we need little other than the letter and spirit of these provisions. \* \* \* While those salutary provisions remain upon the statute books, not as a restriction upon the citizen or suitor, but for his protection against the mistakes, the ignorance and unskillfulness of pretenders, we cannot allow an action to be commenced or prosecuted by an 'agent' who, as such, is expressly inhibited the privilege and denied the power. \* \* \* This act was passed, we believe, in a spirit of liberality toward suitors, and for their protection against the practices of those who might seduce their confidence and induce them to trust the latter in the management of important interests, when suitors could not possibly ascertain the skill and qualifications of those in whom they confided, or their acquaintance with the most intricate, difficult and important of human sciences. The statute has further provided that, for malpractices, etc., the Supreme Court may strike the name of an attorney from the roll. Should he be enabled, under the character of agent, to resume the practice, the intent of the law would be defeated and all its provisions rendered null and void." By this opinion the power of the legislature with reference to the subject is recognized, and the principle on which its recognition is based is, that it is the exercise of the police power for the protection against mistakes, ignorance and unskillfulness by suitors, who cannot possibly inquire into the skill and qualifications, with reference to an intricate difficulty and important question of science, of those who alone may go into courts as their representatives.

The court discussed again the question of admission to the bar under the statutes of the State in the case of

*In re Bradwell*, 55 Ill. 535. In that case it was said (p. 537): "He is an officer of the court, holding his commission in this State from two of the members of this court, and subject to be disbarred by this court for what our statute calls 'malconduct in his office.' He is appointed to assist in the administration of justice, is required to take an oath of office and is privileged from arrest while attending courts. Our statute provides that no person shall be permitted to practice as an attorney or counselor at law without having previously obtained a license for that purpose from two of the justices of the Supreme Court. By the second section of the act it is provided that no person shall be entitled to receive a license until he shall have obtained a certificate from the court of some county of his good moral character, and this is the only express limitation upon the exercise of the power thus entrusted to this court. In all other respects it is left to our discretion to establish the rules by which admission to this office shall be determined. But this discretion is not an arbitrary one, and must be exercised subject to at least two limitations. One is, that the court should establish such terms of admission as will promote the proper administration of justice; the second, that it should not admit any persons or class of persons who are not intended by the legislature to be admitted, even though their exclusion is not expressly required by the statute. The substance of the last limitation is simply that this important trust reposed in us should be exercised in conformity with the designs of the power creating it. \* \* \* It is sufficient to say that in our opinion the other implied limitation upon our power, to which we have above referred, must operate to prevent our admitting women to the office of attorney at law. If we were to admit them we should be exercising the authority conferred upon us in a manner which we are fully satisfied was never contemplated by the legislature. \* \* \* In view of these facts, we are certainly warranted in saying that when

the legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended equally to men and women." By this opinion it is expressly held that the power to license is delegated to the court by the legislature, and it was recognized that the legislature had the right to impose limitations to such extent as it might deem proper, and that it had the right to take away the power.

The power to license and the power to disbar are alike the subject of legislation in the statutes to which reference has been made, and in *Winkelman v. People*, 50 Ill. 449, it was held that the circuit court had no power to suspend an attorney at law from practice. In that case it was said (p. 451): "The subject of attorneys and counselors at law has been considered by the legislature, and no power over them for misconduct—and such was the import of the charge against appellant—has been confided to the circuit courts. No power has been given them to strike an attorney from the rolls for any cause. In the Supreme Court alone is that power reposed. \* \* \* The legislature has conferred this power expressly upon this court. By the fourth section of the act respecting attorneys and counselors at law it is provided, among other things, that the justices of the Supreme Court, in open court, shall have power, at their discretion, to strike the name of any attorney or counselor at law from the roll, for misconduct in office. (Gross' Comp. 41.) And there is a propriety in this, as the appointment of attorneys and counselors is made by that court and the power of removal appropriately rests with the power to appoint. In some States they are appointed by the circuit courts, and, of course, removable by them for proper cause. We know of no power inherent in the circuit court to suspend from practice an attorney duly licensed by this court,—at least none so to suspend him as virtually to strike him from the roll. But it may be asked, has

the circuit court no power over an attorney who shall be guilty of misconduct, such as charged against the appellant? The answer is, such court possesses ample power in the premises. Altering the pleas of a court is not only an offense of a grave character, but, being done without the authority of the court in which the files are, is a contempt of that court, its usages and customs, and is punishable by fine and imprisonment. On the possession of this power can those courts safely repose."

In *People v. Palmer*, 61 Ill. 255, a proceeding was had in this court to strike the name of the respondent from the roll for misconduct in office. In making the rule absolute it was said (p. 256): "In a certain contingency the discharge of the duty required is painful and disagreeable, but as it is imposed by the statute we cannot shrink from its performance. \* \* \* The statute provides that this court, at discretion, shall have power to strike the name of any attorney or counselor at law from the roll for misconduct in office. It further makes it the duty of the court, whenever it shall be made to appear that any attorney has neglected, upon demand and tender of reasonable fees, to pay over or deliver money or property to his client, to direct that the name of such attorney shall be stricken from the roll of attorneys of this court. \* \* \* This court is responsible, to some extent, for the honesty and capacity of those who shall minister at the altars of justice. We must grant the license to practice, and in the proper case it is our duty to disbar."

In a similar case (*People ex rel. v. Goodrich*, 79 Ill. 148,) it was said (p. 153): "This court having power, by express law, to grant a license to practice law, has an inherent right to see that the license is not abused or perverted to a use not contemplated in the grant. \* \* \* In view of our duty as imposed by the statute, and of the defendant's rights as guaranteed him by the constitution and the laws, we are unable to see why this court has not and should not have the power to purge itself of all unclean-

ness which may be found in its cloisters, and ridding itself of any nuisance which may desecrate them."

In *Moutray v. People ex rel.* 162 Ill. 194, a proceeding in the nature of an information was instituted in the circuit court of Richland county, asking that the respondents be suspended from the practice of law in that court. A motion was made by the respondents to quash the information because the misconduct was not charged to be against the peace and dignity of the People of the State of Illinois, which motion was overruled and an answer was filed and the case tried before the court upon the issues formed. The order of the circuit court was that the respondents be suspended from the practice of their profession in that circuit from the 30th day of November, 1895, to the 16th day of June, 1897. In passing on the question presented by that record on appeal to this court it was held (p. 196): "We think there was no error in overruling the motion to quash. The statute (chap. 13, sec. 6,) provides that the justices of this court shall have power, at their discretion, to strike the name of any attorney or counselor at law from the roll for misconduct in his office, and that any judge of a circuit court or of the superior court of Cook county shall for like cause have power to suspend \* \* \* during such time as he may deem proper, subject to the right to have such order set aside by this court upon appeal. The statute does not prescribe the mode in which either of these powers shall be enforced. Rule 50 of this court provides that in case an application shall be made to strike the name of an attorney from the rolls there shall be filed an information, signed by the Attorney General or some State's attorney, and when the information shall be deemed sufficient the court will enter a rule to show cause. It does not appear that any similar or other rule of court having reference to a proceeding for the suspension of an attorney from practice is in force in either the Richland circuit court or in the second judicial circuit. It is the manifest

intent of the statute that the proceeding to suspend from practice shall be summary, and it would seem any appropriate procedure may be adopted, provided the charges are stated with sufficient particularity and reasonable notice is given and opportunity afforded the respondent to produce his testimony and make his defense."

Subsequently an information was filed in this court in the case of *People ex rel. v. Moutray*, 166 Ill. 630, in which it was sought to have the name of the respondent stricken from the roll of attorneys, and it was held (p. 632): "This objection was held of no avail on the appeal of respondents in *Moutray v. People*, 162 Ill. 194. The statute authorizes us, in our discretion, to strike the name of any attorney from the roll for misconduct in his office. Such a proceeding is of a civil character, and not for the purpose of punishment. It is not a prosecution which must be carried on in the name of the People, and the provision of the constitution relied upon has no application. \* \* \* It is our duty to guard and maintain the character of the profession, and to protect the courts and litigants against those who indulge in practices designed to corrupt and defeat the administration of justice."

In all of these opinions there is a recognition of the power to license as delegated to the court by the legislature, or a recognition of the right to disbar by reason of the power conferred by the legislature, and in none of the cases cited has the right to license or to disbar been placed upon any power inherent in the court, but has been recognized as conferred by the legislature. If either the power to license or the power to disbar is inherent, as belonging to a court of record as an attribute necessary for the performance of its judicial duties, and is solely and only a judicial act having its origin in the power of the court alone, it is difficult to see why a circuit court, being a court of general jurisdiction under the constitution of this State, must not possess the power to license or disbar as an inherent power equally with the

Supreme Court of this State; and with the many circuit courts of the State and with the numerous circuit judges there would be constant disagreements and constant conflict with reference to the admission to the bar and with reference to disbarments, and much confusion would result in the administration of justice by reason of the difficulty in determining who are and who are not officers of the court.

Both counsel for the applicants and counsel opposing the motion to admit the applicants and grant them licenses have evidenced great industry and ability in presenting the full history of the question of admission to the bar in England and in this country. But I have not deemed it necessary to enter upon a discussion of the history of this question, as full power is conferred by the statutes of the State, and the legislature has throughout its history, by its legislation, controlled the question of admission to the bar and disbarment, which has been recognized by this court. I concur in the view expressed by Justice Selden in *Cooper's case*, 22 N. Y. 90, where it is said: "The power of the court to appoint attorneys as a class of public officers was conferred originally, and has been from time to time regulated and controlled in England by statute." After reviewing the constitution, decisions and laws of New York State he says: "It is plain, therefore, that although the appointment of attorneys has usually been entrusted, in this State, to the courts, it has nevertheless, both here and in England, been uniformly treated, not as a necessary or inherent part of their judicial power, but as wholly subject to legislative action."

The control exercised by the legislature being the exercise of a police power with reference to the subject matter, cannot be held to be an impairment of judicial power nor the assumption of such judicial power by the legislature. The power of the legislature to prescribe qualifications for the office to which an applicant must

conform was incidentally before the Supreme Court of the United States in *Ex parte Garland*, 4 Wall. 333, where the statute in relation to the test oath was before the court, and it was held: "They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. It has always been the general practice in this country to obtain this evidence by an examination of the parties. In this court the fact of the admission of such officers in the highest court of the State to which they respectively belonged, for three years preceding their application, was regarded as sufficient evidence of the parties possessing the requisite legal learning, and the statement of counsel moving their admission is sufficient evidence that their private and professional character is fair. The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counselors and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it by misconduct ascertained and declared by the judgment of the court, after opportunity to be heard has been afforded. \* \* \* The attorney and counselor being by the solemn judicial act clothed with his office does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors and to argue causes is something more than a mere indulgence, revocable at the will of the court or at the command of the legislature. It is a right of which he can only be deprived, in the judgment of the court, for immoral or professional misconduct. The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question in this case is

not as to the power of courts to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the constitution."

The objection that the act under which this motion for admission is made is special legislation, and therefore violative of the provisions of the constitution, cannot be sustained. It was held in *Williams v. People*, 121 Ill. 84, (on p. 87): "It is the common exercise of legislative power to prescribe regulations for securing the admission of qualified persons to professions and callings demanding special skill, and nowhere is this undoubtedly valid exercise of the police power of the State more wise and salutary and more imperiously called for than in the case of the practice of medicine." The court there pointed out that exempting ten-year practitioners from the act, which required all others to have a diploma or pass a special examination, was not special legislation. It said: "It was in the province of the legislature to prescribe what should be the qualifications for the practice of medicine and what the mode in which they should be determined. The act provides as to a graduate in medicine with a diploma that he may practice upon his diploma, it being verified as pointed out by the act. In regard to others it is provided they shall undergo an examination before the State board or board of examiners and may practice upon the certificate of the board. As respects the proviso, we regard it in the light of but prescribing a qualification—that ten years' practice within the State should constitute a qualification for practicing medicine." See, also, *Atchison, Topeka and Sante Fe Railroad Co. v. Matthews*, 174 U. S. 96.

The act of February 21, 1899, is, in my opinion, constitutional.

Mr. JUSTICE BOGGS: I concur in the dissenting opinion of Mr. Justice PHILLIPS.

THE FIDELITY AND CASUALTY COMPANY

v.

HANNAH M. SITTIG.

*Opinion filed October 13, 1899.*

1. INSURANCE—*what not “voluntary exposure to unnecessary danger.”* Attempting to get upon the platform or steps of a moving car of a railway train just after it has started is not, as matter of law, a “voluntary exposure to unnecessary danger,” in violation of a clause in an accident insurance policy.

2. SAME—*whether attempt to board moving train was obviously dangerous is for the jury.* It is a question of fact for the jury in an accident insurance case whether an attempt to get aboard a moving train just after it had started was obviously dangerous.

3. SAME—*necessary danger includes more than inevitable or unavoidable danger.* The necessity for incurring danger which is impliedly sanctioned in a provision of an accident insurance policy that the insurance does not cover voluntary exposure to unnecessary danger, includes not only that which is unavoidable or inevitable, but also that which men of moral responsibility would regard as of such importance in the performance of duty as to justify the incurring of danger to accomplish it.

*Fidelity and Casualty Co. v. Sittig*, 79 Ill. App. 245, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

JOHN A. POST, and JOHN B. BRADY, for appellant.

THORNTON & CHANCELLOR, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

The Appellate Court has affirmed a judgment recovered by appellee in the superior court of Cook county, against appellant, on a policy of accident insurance.

The insured, Herman C. Sittig, was accidentally killed while attempting to board a suburban train of the Illinois Central Railroad Company. The Appellate Court,

in stating the case, said: "The evidence tends to show that he reached the neighborhood of the steps of the station platform just after the train had started; that he threw his valise on the platform of the car, seized the railing and attempted to climb on, but either lost his hold or fell after being carried some distance, or else was knocked off and killed by coming in contact with a small building used as a ticket office, which stood very near the track and distant about one hundred and forty feet from the station platform." The evidence shows that this is a fair statement of the accident.

The insured was a traveling salesman and so described in the policy, which stated that "this insurance covers injuries received in travel by regular passenger or mail trains." The policy also contained this clause: "This insurance does not cover \* \* \* voluntary exposure to unnecessary danger;" and the contention of the appellant is that the insured met his death by exposing himself voluntarily to unnecessary danger, and that for that reason the judgment cannot be sustained. So far as the assignment of error embraces the question of fact involved in the decision of the Appellate Court, such decision is, by virtue of the statute, final, and we shall not, therefore, follow appellant's counsel in their argument upon the facts. But at the close of the evidence the defendant asked the court to instruct the jury to find a verdict for the defendant, and took an exception to the court's refusal to give the instruction, and thus the legal sufficiency of the evidence to sustain the judgment is presented to us for decision.

There was sufficient evidence to sustain the conclusion that after the insured had secured a secure footing upon the steps of the car, and was holding to the hand-rail and about to draw himself upon the platform of the car, he was struck with such force upon the side and back of his head by the ticket office building, as the train passed it, as to break his neck and knock him under the train.

He was a traveling salesman, but what was the particular emergency or necessity for his effort to board this particular train after it had started does not appear from the evidence. Nor does it appear that he knew of the ticket office building, or its close proximity to the track or to the moving cars. The trainmen testified that the train, after starting, had moved from one hundred to one hundred and twenty-five feet, and was going at a speed of from eight to ten miles an hour when the insured attempted to get aboard, but other witnesses testified to a less degree of speed. There was testimony, also, that some one called to the insured as he was about to make the attempt to board the train, not to do so, but whether or not this warning was heard by the insured does not appear. The death by accident insured against by the policy having been proved, it devolved on the defendant to prove a violation by the insured of the condition, or, rather, that by his act he brought himself within the exception in the policy, relied on to avoid payment. This exception, as applicable to this case, was, in substance, that, although accidental, death caused by voluntary exposure to unnecessary danger was not insured against. To relieve the company from liability it was necessary to establish two facts: First, that the exposure to danger was voluntary on his part; and second, that it was unnecessary.

The term "voluntary exposure" does not mean simply that the act of attempting to get aboard of the moving train was voluntary or was consciously and intentionally performed, but also that the insured was conscious of the danger to which he was then exposing himself and voluntarily assumed it, or that the danger was so apparent that a man of ordinary intelligence would, under the circumstances, necessarily have known it. One may voluntarily do an act exposing himself to great danger which danger he does not apprehend and which is not obvious. In such a case it could not be said that he vol-

untarily exposed himself to danger. If he does not know of the danger, how can it be said that he voluntarily assumes it or exposes himself to it? Mere failure to observe ordinary care would not, as in an action for negligence, defeat a recovery on the contract. This view of the law is not controverted by appellant. Indeed, the trial court, at appellant's request, instructed the jury that the words "voluntary exposure," as used in the policy, implied conscious, intentional exposure,—something which he was willing to take the risk of; that it meant a willing or willful assumption of the risk knowing the risk,—a willful, conscious assumption of the risk of danger. As before said, there was no evidence whatever that he knew of the proximity of the ticket office building, or had any reason to believe that he was exposing himself to the danger of coming in contact with any such object before he could get within the car. His experience, strength and activity may have been such, so far as the evidence shows, that there was less danger to him in mounting a car going at the speed mentioned by the witnesses than there would be to many persons in mounting a car at the moment of starting, and it would be an unreasonable rule to adopt, to hold, as a legal proposition, that a traveler who steps upon the platform or steps of a moving car of a railway train voluntarily exposes himself to unnecessary danger,—though it may be conceded he is guilty of negligence in so doing. There are, doubtless, few trainmen whose duty it is to alight at station platforms who do not board the train after it has started. In doing so it certainly could not be said, as a matter of law, that they thus incur obvious danger. At what rate of speed, then, must the train be moving before it can be said that an attempt to get aboard would be obviously dangerous? All reasonable minds would agree that it would be obviously dangerous to attempt to climb upon a passing railway train going at full speed or at a high rate of speed, and in a proper case, doubt-

less, the jury would be so instructed; but it does not follow that it would be proper to so instruct the jury in a case where the train had not, after starting, proceeded beyond a hundred or a hundred and twenty-five feet and had acquired only such speed as shown by the evidence in this case. The question in such a case is one of fact, and not of law, and in the case at bar the question of fact has been conclusively settled against the appellant. It would be to usurp the province of the jury and of the courts below, and to do what by statute we are forbidden to do, should we reverse this judgment on this contention of appellant.

Many cases have been cited, but in most of them the provisions of the policy were different or the facts found were materially different from those in the case at bar. Thus, in *Tuttle v. Insurance Co.* 134 Mass. 175, in addition to a provision similar to the one here under consideration, the policy required the insured to use all due diligence for his personal safety and protection. But we need not review the cases which were decided upon questions of fact or upon dissimilar provisions of the insurance contract. Here we are asked to declare, as a matter of law, against the conclusive finding of facts to the contrary, that the insured voluntarily exposed himself to unnecessary danger,—this, too, notwithstanding there is no evidence, direct or circumstantial, to which we have been referred, whether such exposure was necessary or not. For one to leap into a turbulent stream, rush into a burning building, or do any other hazardous thing to save human life, would be a voluntary exposure to danger but not to unnecessary danger. So, too, many emergencies in the lives of men occur where the most urgent necessity requires their presence at some particular place at some particular time, and where to miss a train would involve serious consequences. In such a case a voluntary exposure to danger might not be unnecessary. The presence of a physician or surgeon at some critical period in the

illness or injury of a human being might be necessary to save life, and it might be necessary for him to expose himself to danger to reach his patient or in some other respect to perform his professional duty. The necessity implied in the provision of the policy does not mean only that which is unavoidable or inevitable, but also any object or purpose which men of moral responsibility and prudence would regard as of such serious importance in the performance of duty as to demand or justify the incurring of risk of danger to accomplish it. Whether the jury, and finally the Appellate Court, decided the question of fact correctly we cannot inquire, but it is clear that the trial court did not err in refusing to give to the jury the instruction to find for the defendant.

It is also urged that the trial court erred in refusing certain other instructions, but we are of the opinion no error was committed in that regard.

The judgment must be affirmed.

*Judgment affirmed.*

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THE CITY OF DIXON  
*v.*  
ROBERT H. SCOTT, Admr.

*Opinion filed October 13, 1899.*

181 116  
197 630

1. INSTRUCTIONS—*instruction should not call attention to credibility of specified witness.* An instruction which authorizes the jury to consider the interest of a specified witness in the result of the suit in determining his credibility is properly refused where other interested witnesses testified.

2. SAME—*when an instruction on credibility of witness may be refused.* The refusal of an instruction that the interest of a witness might be considered in determining what credit, "if any," should be given to his testimony, cannot be complained of when he was not impeached or shown to be unworthy of credit.

3. SAME—*when assumption of fact in instruction will not reverse.* That an instruction in an action for personal injuries assumed that a

city had notice of a defect in a walk cannot be complained of when the defendant's instructions properly gave the law to the jury on that point.

4. NEGLIGENCE—*what not necessary to constitute negligent act the proximate cause of injury.* It is not necessary that the particular injury and the particular manner in which it occurred might reasonably have been expected to follow from the negligent act complained of, to make such act the proximate cause of the injury.

*City of Dixon v. Scott*, 81 Ill. App. 368, affirmed.

**APPEAL** from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Lee county; the Hon. JAMES S. BAUME, Judge, presiding.

H. A. BROOKS, H. S. DIXON, and BARGE & BARGE, for appellant.

MORRISON & BETHEA, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

The first judgment for the plaintiff in this case was reversed by the Appellate Court, (74 Ill. App. 277,) but on the second trial the plaintiff secured another judgment, which has been affirmed. The only questions raised by appellant on this appeal which we can consider relate to the instructions.

The action was case for an injury to the plaintiff caused by a defective sidewalk, and the defendant asked this instruction:

“The court instructs the jury that in determining what credit, if any, should be given to the plaintiff's testimony, it is the duty of the jury to take into consideration the interest which the plaintiff has in the result of this suit as a party to this case.”

The court modified that part of the instruction after the word “testimony” so as to read, “the jury are authorized to take into consideration and consider the interest which,” etc., and gave the instruction as modified. Ap-

pellant insists here that in this the court erred. The evidence tended to prove that other witnesses testified in the case who were interested in the result of the suit, and we have held that in such cases it is not error to refuse an instruction which singles out one such witness and applies to him only this test of credibility. (*Pennsylvania Co. v. Versten*, 140 Ill. 637.) True, the modification did not relieve the instruction of this defect, but it changed its peremptory character, and as given was, as an entire proposition, more favorable to the defendant than it was entitled to. The court would also have been justified in refusing it altogether for another reason. It is not pretended that the plaintiff was in any way impeached, or that there was any evidence (upon which an instruction could have properly been based) that the jury might refuse to give any credit whatever to her testimony in making up their verdict, yet the instruction in question, by the words "if any," contained an implication by the court to the jury that the plaintiff might not be entitled to *any* credit as a witness. Whether, if the verdict had been against the plaintiff and she had complained of this instruction, she would have been entitled to a new trial, it is not necessary here to decide, for a defect in an instruction may justify its refusal, but may not be sufficiently harmful to reverse the judgment where the instruction is given. (*Devlin v. People*, 104 Ill. 504.) We are of the opinion that the appellant has no ground of complaint in the ruling of the court in giving the instruction as modified. *Phenix Ins. Co. v. LaPointe*, 118 Ill. 384.

The court decided properly, also, in refusing the defendant's third instruction having reference to the question of proximate cause of the injury. This instruction would have told the jury that if "it was not natural or reasonable to expect or anticipate that Mrs. Kost, or any one else, would step on the end of one of said planks and cause the other end to tip up, and thereby trip or cause the plaintiff to fall and receive the injury complained of,"

then the plaintiff could not recover. In order to make the negligent act of appellant the proximate cause of the injury it was not necessary that the particular injury and the particular manner in which it occurred might reasonably have been expected to follow from such negligent act. In 16 Am. & Eng. Ency. of Law, 438, the author says: "Consequences which follow in unbroken sequence, without an intervening cause, from the original wrong, are natural; and for such consequences the wrongdoer must be held responsible, even though he could not have foreseen the particular results, provided that by the exercise of ordinary care he might have foreseen that some injury would result from his negligence." It would be very unreasonable to make the liability of the defendant depend on the question whether the precise injury complained of and the manner of its occurrence ought to have been foreseen. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242.

The refusal to give other instructions asked by the defendant is assigned as error, but we are of the opinion that the assignment is not sustained. It is unnecessary here to mention these instructions in detail. The court gave sixteen instructions at the request of the defendant, covering every important phase of the case, and we find none refused, important to the defense and correct in themselves, which were not rendered unnecessary by those given. Nor can we agree with counsel for appellant that the instructions given at plaintiff's request assumed that the city had notice of the defect in the walk. Besides, the instructions given at the instance of the defendant properly informed the jury of the law on this branch of the case.

We find no error, and the judgment must be affirmed.

*Judgment affirmed.*

GEORGE H. MARTIN *et al.*

*v.*

ROBERT DUNCAN.

*Opinion filed October 18, 1899.*

1. EVIDENCE—*interpleading claimant of attached property may prove his own acts of ownership.* An interpleading claimant of attached property may prove acts of his own tending to show a change in the character of his possession after he took possession, under a chattel mortgage, of the goods, which he had theretofore controlled as agent of the mortgagor.

2. SAME—*facts under which attachment judgment is inadmissible to show that plaintiffs were creditors.* A judgment recovered in an attachment suit against a chattel mortgagor, and offered to show that plaintiffs were creditors of the mortgagor, and as such entitled to attack the good faith of the mortgage transaction, is inadmissible for that purpose when the judgment was rendered more than a year after the execution of the mortgage.

MAGRUDER, J., dissenting.

*Martin v. Duncan*, 79 Ill. App. 527, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of LaSalle county; the Hon. CHARLES BLANCHARD, Judge, presiding.

SMITH, HELMER, MOULTON & PRICE, and RECTOR C. HITT, for appellants.

JAMES J. CONWAY, and BREWER & STRAWN, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

Appellee, Robert Duncan, interpleaded and claimed a stock of goods which had been attached as the property of his brother, George W. Duncan. Issues were made up on his interplea, and the verdict and judgment were in his favor. That judgment was reversed by this court and the cause remanded in *Martin v. Duncan*, 156 Ill. 274. The opinion in that case states more fully the facts. We there held that the contract of sale and re-sale was a

chattel mortgage, and that the trial court erred in instructing the jury to the contrary. The cause was retried and Duncan again recovered. The judgment has been affirmed by the Appellate Court.

The appellants now contend that the court erred in allowing appellee to prove certain acts of his own in dealing with the stock of goods after he took possession of it under the mortgage. He had previously been in possession as agent of his brother, the mortgagor, and we think the acts shown tended to prove a change in the character of his possession, and that he then openly claimed, treated and dealt with the property as his own.

It is also contended that it was error to refuse to allow appellants to give in evidence the record of their judgment in the attachment suit against George W. Duncan. The object, doubtless, was to prove that appellants were creditors of George W. Duncan, and entitled, as such creditors, to attack the *bona fides* of the sale and transfer to Robert Duncan. Standing alone, this judgment would not have proved or tended to prove that appellants were such creditors at the time of the sale and transfer to Robert, which took place more than a year before the judgment was rendered. No other proof or offer of proof was made in connection with the judgment, and there was no error in refusing to admit it in evidence. *Springer v. Bigford*, 160 Ill. 495.

Much care was exercised by the court in instructing the jury, and although appellants complain of the rulings of the court in giving, refusing and modifying instructions, we are unable to find that any error was committed. It is apparent that the important questions involved in the case were questions of fact, and they having been settled against appellants, we cannot interfere.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

Mr. JUSTICE MAGRUDER, dissenting.

JAMES W. GIBSON

*v.*

EVA NELSON *et al.*

*Opinion filed October 13, 1899.*

181	122
e184	584
181	123
189	1292
f189	296

WILLS—*testator may sign after witnesses, if part of the same transaction.* A will is not invalid because the signatures of the attesting witnesses were attached before that of the testator, who signed the instrument directly afterward in their presence and as part of the same transaction.

APPEAL from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

GEORGE G. BELLows, for appellant:

The statute of this State provides the manner in which wills are to be executed,—among other things that a will shall be attested by two witnesses in the presence of the testator. *Hurd's Stat.* 1897, chap. 148.

Attestation is an act of the senses; subscription an act of the hand. *Swift v. Wiley*, 1 B. Mon. 114.

The word "attested" may in our statute be used in a two-fold sense, including the act of the senses as well as the act of the hand. The attestation is the presence of the witnesses in witnessing the signature of the testator or hearing his declaration that it is his will. Subscription is to establish identification when occasion demands. Witnesses need not know the contents. *Higdon's Will*, 6 J. J. Marsh. 445.

A substantial compliance with the spirit of the statute is all that reason and sound policy require. *Montgomery v. Perkins*, 2 Metc. (Ky.) 449.

The order of time in which the witnesses and the testator subscribed their names is not material, as long as it is all one act. By attestation it is intended that a will is published, and subscription is for identification. *Swift v. Wiley*, 1 B. Mon. 114; *O'Brien v. Gallagher*, 25 Conn. 230.

'Where the acts are substantially contemporaneous it cannot be said there is any substantial priority. *Kaufman v. Caughman*, 49 S. C. 165.

M. C. HARPER, and O. C. PETERSON, for appellees:

A paper purporting to be a will, but signed by the witnesses before being signed by testator, is not a will. *Duffie v. Corridon*, 40 Ga. 122; *Brooks v. Woodson*, 87 id. 379.

Since it is the signature of the testator that subscribing witnesses are to attest, there can be no valid attestation or subscription unless it be a fact that the testator has actually signed his name or caused it to be signed before they subscribe their names. *Simmons v. Leonard*, 91 Tenn. 183; *Chase v. Kittredge*, 11 Allen, 49; *Jackson v. Jackson*, 39 N. Y. 153; *Sisters, etc. v. Kelly*, 67 id. 409; *In the Goods of Olding*, 2 Cur. Eccl. 865; 3 id. 117; *Rugg v. Rugg*, 21 Hun, 383; *Cooper v. Bockett*, 3 Cur. Eccl. 648; *Shaw v. Neville*, 1 Jur. (N. S.) 408.

Mr. JUSTICE CARTER delivered the opinion of the court:

Upon their bill brought to contest the last will, and the probate thereof, of Leander E. Nelson, deceased, the appellees obtained a decree based upon a verdict of the jury that the will had not been signed by the testator when the attesting witnesses signed their names as witnesses to the instrument, and that it was not the last will of the deceased, and it was accordingly set aside. The record is now before us on the appeal of James W. Gibson, the principal legatee and devisee.

While there was some controversy of fact, yet we think the effect of the testimony of the subscribing witnesses was that they subscribed their names as witnesses to the instrument, as the last will of the testator, at his request and in his presence, but that he did not sign the will until after the signatures of the witnesses had been affixed; that the witnesses and the testator were all present at the time; that it was on the same occasion and was one

transaction, completed when all were present, but that in the mere order of signing the witnesses preceded the testator. On behalf of the contestants the court gave to the jury the following instruction:

"The jury are instructed, that in order that a will be properly attested and be a valid will it is necessary that the attesting witnesses subscribe their names to the same as witnesses in the presence of the testator and at his request, and that the name of the testator be signed to the instrument before the signatures of the attesting witnesses are attached; and you are instructed that if you find, from the evidence, that the signature of Leander E. Nelson was not attached to said instrument so offered here as his will, until after the names of the attesting witnesses were attached thereto, then said instrument is not the last will and testament of said Nelson, and it is your duty so to find."

The question is thus presented for decision whether, under our Statute of Wills, an instrument intended as a will, appearing to have been executed and witnessed with all the formalities required by the statute, must fail to take effect as a will merely because the act of the testator in signing the will followed that of the witnesses, though done in their presence on the same occasion and as a part of one entire transaction. Section 2 of the act in regard to wills, so far as it affects this question, provides: "All wills \* \* \* by which any lands, \* \* \* goods and chattels are devised shall be reduced to writing and signed by the testator or testatrix, or by some person in his or her presence and by his or her direction, and attested in the presence of the testator or testatrix by two or more credible witnesses, two of whom declaring on oath or affirmation, before the county court of the proper county, that they were present and saw the testator or testatrix sign said will \* \* \* in their presence, or acknowledged the same to be his or her act and deed, and that they believed the testator or testatrix

to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of said will \* \* \* to admit the same to record; \* \* \* and every will, \* \* \* when thus proven to the satisfaction of the court, shall, together with the probate thereof, be recorded, \* \* \* and shall be good and available in law," etc.

It will be noticed that the statute does not in terms require the subscribing witnesses to attest or certify that the will was signed by the testator *before* they subscribed their own names, and in *Hobart v. Hobart*, 154 Ill. 610, we held that where the testator acknowledged the *will* to be his act and deed, that was sufficient without acknowledging specifically and in terms that he had signed it; that as it would not be a will without his signature, it would, in the absence of proof, be presumed from his statement that it was his will and that he had signed it. In that case it was pointed out that decisions based upon the English statute, and the statutes of New York and other States requiring specifically that the *signature* be made or acknowledged in the presence of the witnesses, were not applicable here, where the statute requires that the testator acknowledged merely the *will*. It cannot, of course, be presumed in the case at bar that at the precise moment when the witnesses subscribed their names to the instrument the testator had signed it, for they testified to the contrary on the trial below; but he signed it in their presence, as required by the statute, and the several acts of signing by the testator and witnesses took place on the same occasion and constituted one transaction, viz., the execution and attestation of the will. Must the instrument be held inoperative as a will merely because the testator and the witnesses did not observe the usual order, in point of time, in signing their names? To so hold would, in our opinion, require a greater degree of nicety in the execution of wills than is required by the statute. Suppose the draftsman of a will has read it

over to the testator, and the testator, having approved it, requests him to subscribe his name as a witness, and he does so at the time and in the presence of the testator and then hands the pen to the testator, who thereupon signs the will, is there any provision of the statute or rule of law which would require the courts to take notice of the difference in the moment of time intervening between the two acts of signing, where both were parts of one transaction? We know of none. It would not be physically impossible for the testator and the witnesses to sign at the same time, yet under the rule contended for and as held by the court below the will would be invalid because the testator did not sign first. Undoubtedly the proper order is for the testator to sign first, for after the witnesses had signed he might never sign, or might sign on some other occasion or out of their presence, which would not be a compliance with the statute; but we are not prepared to hold that the validity of the instrument as a will can be made to turn upon the mere order in which the signatures are attached to the instrument, where all are attached at the same time.

We are referred to cases, both English and American, which have so decided, but we do not regard the reasoning employed satisfactory when applied to a case arising under our statute. In *Chase v. Kittredge*, 11 Allen, (Mass.) 63, while it was said that a will was not sufficiently witnessed where the witnesses signed their names before the testator signed, still the fact was, in that case, that one of the witnesses had not only signed his name before the testator had, but had signed it out of the presence of the testator. Still, it has undoubtedly been held in many cases that a will signed by the attesting witnesses before it was executed by the testator, though on the same occasion, is not entitled to probate. We are of the opinion, however, that as applicable to cases arising under our statute, cases holding to the opposite view are sustained by the better reasoning. In *O'Brien v. Galaher*, 25 Conn.

229, the court said: "Where, as in the present case, witnesses are called to attest the will, and being informed what the instrument is, subscribe their names thereto as witnesses, and the testator on his part and in their presence duly executes the instrument as his will, and all is done at one and the same time and for the purpose of perfecting the instrument as a will, we cannot say that it is not legally executed merely because the names of the witnesses were subscribed before that of the testator." So, also, in *Rosser v. Franklin*, 6 Gratt. 1, (52 Am. Dec. 97,) it was held that "the mere fact whether, in the order of time, the testatrix made her mark before or after the subscription of the witnesses, is, under the circumstance, in nowise material, insomuch as the whole transaction must be regarded as one continuous, uninterrupted act, conducted and completed within a few minutes, while all concerned in it were present, and during the unbroken supervising attention of the subscribing witnesses." So, too, in *Miller v. McNeil*, 35 Pa. 217, (78 Am. Dec. 333,) the court said: "Our statute contemplates, undoubtedly, a signature by the testator and then a signing by witnesses in attestation of the signature; \* \* \* but when a transaction consists of several parts, all of which occur at the same moment and in the same presence, are we required to undo it because it did not occur in the orderly succession which the law contemplates? No language of our statute of wills imposes any such necessity upon us, and we would not decide anything so unreasonable except under stress of very positive statutory language. The execution and attestation of the will were contemporaneous, or, rather, simultaneous, acts, and we will not regard the question who held the pen first,—the testator or his witnesses." In 1 Redfield on Wills, \*226, it is said: "The particular order of the several requisites to the valid execution of a testament is not at all material, provided that they be done at the same time and as a part of the same transaction."

These authorities, and others following them, hold, in our opinion, the more reasonable rule. To invalidate such a will, otherwise properly executed and attested, would enable a witness, after the lapse of many years, to defeat its operation by proof of an unimportant fact which few could then remember. How many witnesses to wills, unaided by presumptions and inferences which arise from the ordinary course of procedure in the execution of wills, could remember as a fact that the testator signed the will first? While it is true, as contended, that the instrument is not a will until it has been executed by the testator and cannot be attested as a will by the witnesses without such execution, it is also true that it is not a complete will until it has been attested by the necessary witnesses, the statute requiring both. While this attestation required by our statute includes the subscription of their names by the subscribing witnesses, it means much more,—that is, that they bear witness and certify to the facts required by the statute to make a valid will. (*Swift v. Wiley*, 1 B. Mon. 114.) The mere physical act of signing their names does not constitute the whole, nor the most important part, of the duty of attesting witnesses. If all of the several acts required by the statute are done upon the same occasion, in the presence of the testator and the attesting witnesses, and, as said in the case cited above, under their unbroken supervising attention and as parts of one entire transaction, we can not hold that the instrument is rendered inoperative as a will by merely proving the fact that the signatures of the witnesses were affixed before the signature of the testator. In the case at bar this fact did not appear by the testimony of the subscribing witnesses given in the probate court when the will was admitted to probate, but they testified to it on the hearing of the issue in this case in the circuit court. The will upon its face appeared to have been properly executed and witnessed, and the mere fact, which appeared by the evidence, that the tes-

tator signed it after the witnesses had signed was rendered harmless by the further fact shown by the evidence, that these several acts of signing were done at the same time and as parts of the same transaction.

The court erred in giving the instruction in question. The judgment will be reversed and the cause remanded.

*Reversed and remanded.*

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JOHN B. TREVOR, Jr., *et al.* v. JAMES B. COLGATE *et al.*  
and

EMILY N. TREVOR *et al.* v. SAME.

*Opinion filed October 13, 1899.*

1. NOTARIES PUBLIC—*power of notary to administer oaths is statutory.* The power to administer oaths is not incidental to the office of notary public, but depends upon statutory enactment.

2. SAME—*when certificate of foreign notary is not prima facie evidence of his authority.* A certificate under seal by a foreign notary public is not made *prima facie* evidence of his authority to administer oaths by section 6 of the act on oaths and affirmations, (Rev. Stat. 1874, p. 728,) unless it contains a recital of the fact of his authority.

3. JURISDICTION—*when affidavit of service does not confer jurisdiction.* An affidavit of the service of process upon defendants in another State, made before a notary public of such State, is not competent evidence of the fact in the absence of proof as to the authority of the officer to administer oaths, and does not confer jurisdiction.

4. SAME—*when recital in decree of partition does not establish jurisdiction of minor defendants.* A recital in the decree rendered in a partition suit against non-resident minors, that notice of the pendency of the cause has been published for at least thirty days, does not establish jurisdiction under sections 12 and 13 of the Chancery act, (Rev. Stat. 1874, p. 199,) authorizing service by publication in a newspaper at least once in each week for four successive weeks.

APPEAL from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

JOHN J. HERRICK, guardian *ad litem* for appellants John B. Trevor, Jr., and Emily L. Winthrop.

HERRICK, ALLEN, BOYESON & MARTIN, for appellants  
Emily N. Trevor, Mary T. Winthrop and Emily H. Trevor.

PENCE, CARPENTER & HIGH, for appellees.

Mr. JUSTICE BOGGS delivered the opinion of the court:

These are separate appeals from the same decree. The proceeding was a bill in chancery for partition. Certain of the appellants, who were necessary defendants to the bill and against whom the decree passed, are minors and residents of the State of New York. The decree must be reversed for the reason the court did not obtain jurisdiction of the persons of these defendants.

The decree recites: "Due proof of publication notice of the pendency of this cause has been had on the said infant defendants for at least thirty days before the first day of the term." This recital is insufficient to establish jurisdiction for many reasons, only one of which need be referred to. Sections 12 and 13 of chapter 22 of the Revised Statutes, authorizing this mode of service, require, among other things, the notice shall be published in a newspaper at least once in each week for four successive weeks, as to which the recital is entirely silent. This record does not contain the affidavit required by section 12 of the said chapter, nor proof of any character of publication of the notice in a newspaper.

Appellees rely upon service by a copy of the bill under the provisions of section 14 of the said chapter. The affidavit of one Caleb A. Burbank, purporting to have been sworn to before Harriet L. Mason, as notary public of Kings county, State of New York, is relied upon to establish the delivery of a copy of the bill to said minor non-resident appellants. The *jurat* to the affidavit is as follows:

"Sworn to before me this 30th day of March, 1898.

[SEAL.]

Cert. filed in New York Co."

HARRIET L. MASON,

*Notary Public, Kings County.*

No proof was produced as to the authority possessed by notaries public in the State of New York to administer oaths. The power to do so is not incidental to that office. If possessed it is by the force of an express enactment. *Keefer v. Mason*, 36 Ill. 406.

It is urged the *jurat* and official seal of the notary public establish, *prima facie*, the requisite authority, under the provisions of section 6 of chapter 101 of the Revised Statutes, entitled "Oaths and Affirmations," which is as follows: "When any oath authorized or required by law to be made is made out of the State, it may be administered by any officer authorized by the laws of the State in which it is so administered, and if such officer have a seal, his certificate under his official seal shall be received as *prima facie* evidence, without further proof of his authority to administer oaths." The position of counsel for appellees is, the certificate of the notary, under his official seal, that he has administered the oath, is made by said section 6 *prima facie* proof that the notary had authority to administer oaths. That construction cannot be accepted. The meaning of the section is, if the notary shall certify, under his official seal, that he has authority to administer oaths under the statute of the State under which he holds his commission, such certificate shall be *prima facie* evidence that he has such statutory authority. *Smith v. Lyons*, 80 Ill. 600; *Ferris v. Commercial Nat. Bank*, 158 id. 237.

The court erred in accepting the affidavit as competent evidence that a copy of the bill had been served on these appellants. It was error to appoint a guardian *ad litem* to appear and defend for them, or to render any decree purporting to affect their interest in the real estate sought to be partitioned. *Hickenbotham v. Blackledge*, 54 Ill. 316; *Campbell v. Campbell*, 63 id. 462; *Bonnell v. Holt*, 89 id. 71.

The decree will be reversed and the cause remanded.

*Reversed and remanded.*

WILLIAM M. GUNTON

*v.*

THOMAS HUGHES *et al.*

*Opinion filed October 13, 1899.*

181	182
f96a	638
181	182
101a	488
181	183
200	68
181	182
116a	167

PLEADING—in suits at law matters specially pleaded cannot be avoided by amending the declaration. Matters in confession and avoidance of a special defense set up by plea should, in actions at law, be made by replication, and not by amendment to the declaration.

*Gunton v. Hughes*, 79 Ill. App. 661, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANECKY, Judge, presiding.

C. VANALEN SMITH, (JAMES A. FULLENWIDER, of counsel,) for appellant.

LEVI SPRAGUE, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

To a secondly amended declaration in an action on the case for libel, filed by appellant, a general and special demurrer were sustained, and on appeal the Appellate Court affirmed the judgment rendered in bar of the plaintiff's action. Upon this his further appeal the appellant, who stood by his declaration below, insists that his pleading set forth a good cause of action, which was not barred, and that it was error to sustain the demurrer.

To the original declaration the defendants had, in addition to other pleas, pleaded the Statute of Limitations, and the plaintiff then filed the amended declaration now under consideration, in which he, in alleging the libel complained of, set out two certain letters of the defendants, dated, respectively, February 27 and March 3, 1894, written to certain lumber merchants in answer to their inquiries as to the financial standing and responsibility

of the plaintiff and as to the probable correctness of any financial statement he should make, the first of which letters contained the following: "On account of our former connections with the party named we are sorry you asked us such a leading question concerning him. But if a statement he has made is a sample of what he is making to you, then there is no reliance to be placed in them. In fact, that is his greatest trouble. Trust this is confidential." And the second contained the following: "We will say we consider the statement radically wrong, as we do not consider him worth any such amount, yet we do not care to go into details." The plaintiff then alleged further that the defendants fraudulently concealed from the plaintiff the fact that they had written and sent said letters, (setting up the facts, and alleging further injury to his business, trade and reputation on account of such concealment,) and alleged that because of such fraudulent concealment he did not discover that he had such cause of action until, to-wit, fifteen months after said letters were sent. The purpose of this allegation was to avoid the statute and to bring the parties within the twenty-second section of the "Act in regard to limitations," which is as follows: "If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards."

We shall not in this case consider the two questions to which counsel have chiefly addressed themselves in argument,—that is, first, whether or not the writing complained of was libelous; and second, whether or not said section 22 applies to such actions. We are satisfied the demurrer was properly sustained to the declaration for another reason which should not be ignored, as it involves well defined distinctions between common law and equity pleading:

In order to avoid the effect of the defendants' plea of the Statute of Limitations, which had been filed to the declaration before it was amended, the plaintiff, pursuing the rules governing equity pleading, amended his declaration and undertook to confess and avoid that branch of the defense. It has become the settled rule in equity in this State, that where it appears on the face of the bill that the cause of action is barred by *laches* or the Statute of Limitations, the defect may be reached by demurrer to the bill. (*Board of Supervisors of Henry County v. Winnebago Swamp Drainage Co.* 52 Ill. 454; *Same v. Same*, id. 299; *Kerfoot v. Billings*, 160 id. 563; *Coryell v. Klehm*, 157 id. 462.) Special replications are not now permissible in equity pleadings, and matters which might be specially pleaded in reply to the answer must be availed of by amendments to the bill. (*Tarleton v. Vietes*, 1 Gilm. 470; Rev. Stat. chap. 22, sec. 28.) When, therefore, the bill sets up the facts in avoidance of the statute or in excuse for the delay in filing the bill, it follows, as a reasonable rule, that their sufficiency may be tested by demurrer. But no such rule obtains in common law pleadings, where special replications are not only allowable but are necessary. No authority at the common law has been cited, and we know of none, which would sustain the method of pleading resorted to in this case. Such a rule prevails in several States under codes, but the practice in this State has always been as at common law, to reply specially to matters in confession and avoidance of special matters of defense set up by plea, and section 32 of the Practice act recognizes the propriety of such replications. In Chitty's Pl. 496, it is said: "It was always necessary to plead the Statute of Limitations specially." In 13 Ency. of Pl. & Pr. 200, the author says: "In actions at law, as contradistinguished from actions under the code, it has always been the established rule that if the defendant desires to avail himself of the Statute of Limitations as a bar to the demand in suit he must plead the

defense. He cannot demur to the declaration, even where it appears on its face that the limitation prescribed by the statute has expired, for the principal reason that thereby the plaintiff would be deprived of the opportunity of replying that the case was within some of the exceptions to the statute, or any other matter which would prevent the bar from attaching."

Such, of course, is the rule, and as the defendant can not, at law, raise the question by demurrer whether the action is barred or not, but must plead the statute if he wishes to avail himself of it, it follows, as a logical sequence, that the plaintiff cannot avail himself of matter in avoidance of the statute by pleading such matter in his declaration before the statute has been set up as a bar by plea. The declaration tendered a double issue, and also was framed in plain violation of established precedents and rules of common law pleading. The demurrer was both general and special, and was properly sustained. To overrule it here would unsettle rules of pleading long established, and introduce confusion and uncertainty where none now exist. The distinctions between common law and equity pleadings are well defined and well understood by the legal profession, and cannot be ignored. The equity cases cited by counsel show only the rule in equity—not the rule at law. As said in *Wisconsin Central Railroad Co. v. Wieczorek*, 151 Ill. 579: "Deviations from well settled rules of proceeding are always of questionable expediency, and where indulged, because of some inconvenience or supposed hardship, have generally introduced confusion, and by becoming precedents have led to the perversion of an orderly and just administration of the law." The plaintiff elected to stand by his declaration rather than to amend.

The judgment will be affirmed.

*Judgment affirmed.*

E. A. CUMMINGS *et al.**v.*

THE WEST CHICAGO PARK COMMISSIONERS.

*Opinion filed October 13, 1899.*

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 181 186  
 s181 US 938  
 181 186  
 e194 1540  
 181 186  
 e213 445

1. EVIDENCE—*extent to which recital in ordinance is prima facie evidence.* A recital in an ordinance providing for an improvement, that the petition of the owners of a majority of the land fronting on the improvement was presented to the municipal authorities, is sufficient *prima facie* evidence of the existence of such jurisdictional fact. (*Thorn v. West Chicago Park Comrs.* 130 Ill. 594, distinguished and explained.)

2. SAME—*effect of recital in ordinance that property owners' petition was presented to authorities.* In an ordinance for an improvement a recital that a petition of the owners of a majority of the land was presented to the municipal authorities, sufficiently shows that the requisite petition was before them, where the recital is as broad as the statute, though the contents of the petition are not stated.

3. PUBLIC IMPROVEMENTS—*when new ordinance for an assessment is sufficiently authorized by original ordinance.* A provision in an ordinance that the cost of the improvement shall be paid by special assessment is a sufficient basis for a subsequent ordinance and proceeding to enforce such assessment, where the original ordinance was declared invalid because the particular form of assessment provided for by it was without authority of law.

4. SAME—*ordinance need not mention prayer of petition as to manner of paying for improvement.* An ordinance for a public improvement need not contain a recital as to the prayer of the property owners' petition concerning the manner in which the improvement should be paid for, where the question whether its expense shall be met by general tax or wholly or in part by special assessment or taxation is a matter for the corporate authorities to determine.

5. SAME—*improvement of two connected parallel strips of boulevard is not a double improvement.* An ordinance for the improvement of strips of land sixty feet in width on each side of a boulevard of which they are parts, (the intervening space being a parkway,) and between which run intersecting streets, provides for but a single improvement.

6. SAME—*when an agreement as to amount of assessment on particular property is not conclusive.* An agreement that property shall be assessed but a certain amount in consideration of building restrictions to which it is subject does not prevent an assessment for the amount to which it is actually benefited, where, by a subsequent decree rendered at the instance of the land owner, the property was relieved from the building restrictions.

APPEAL from the County Court of Cook county; the Hon. W. T. HODSON, Judge, presiding.

WILSON, MOORE & McILVAINE, for appellants.

FRANCIS A. RIDDLE, and H. S. MECARTNEY, for appellees.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This is an appeal from a judgment confirming a special assessment for the improvement of Douglas boulevard, extending from Garfield Park south and east to Douglas Park. A former proceeding to levy an assessment was before us under the titles of *Culver v. People*, 161 Ill. 89, *Farrell v. Town of West Chicago*, 162 id. 280, *Connor v. Town of West Chicago*, 162 id. 287, and *White v. Town of West Chicago*, 164 id. 196. By the decisions in those cases the proceeding was set aside and the judgment of confirmation reversed. The present petition was then filed based upon a new ordinance, and this was brought before us in *West Chicago Park Comrs. v. Farber*, 171 Ill. 146. Since the reversal of the judgment in that case there has been a hearing, at which the assessment roll was confirmed.

At the last hearing appellants moved to dismiss the petition on the ground that the original ordinance was declared void in *Culver v. People, supra*, and therefore said ordinance did not provide for any special assessment which could ever become a charge upon private property, and this attempted assessment is contrary to law and in conflict with the fourteenth amendment to the constitution of the United States. This question was decided adversely to this claim in *West Chicago Park Comrs. v. Farber, supra*, but it is insisted that the decision in that case was wrong. The constitution and the statutes provide for making local improvements by special assessment, and we have uniformly held that they confer no authority to make a local improvement upon some other plan, or without any provision for a special assessment, and af-

terward provide for payment by such assessment. The improvement is to be made by special assessment, and consequently there must be a provision for its payment by that method when it is made. The liability to a special assessment must be created by the ordinance which provides for making the improvement, and such a liability is created by a provision of the ordinance that the cost of the improvement shall be paid by special assessment. The original ordinance, which was passed upon in *Culver v. People, supra*, provided that the improvement should be made "and that the cost thereof, together with the cost of making and collecting the assessment to be made therefor, shall be paid by special assessment upon contiguous property abutting on said boulevard." This was a provision that the improvement should be made by special assessment, and was sufficient upon that subject. The ordinance, however, went further, and there was an attempt to create a particular assessment unknown to the law governing the park commissioners. In that attempt section 2 of the ordinance ordained as follows: "That said special assessment shall be divided into installments; that the first shall be twenty per cent of the total amount of said assessment, and that the deferred installments shall bear interest at the rate of six per cent per annum." A petition was filed in the county court for the appointment of commissioners to spread an assessment, to be divided into installments, the first twenty per cent payable on confirmation of the assessment and the remainder in four installments, payable annually thereafter. There was no authority of law for the particular assessment provided for in the ordinance or the making or confirmation of an assessment of that character, and there was no power or jurisdiction in the court to entertain such a petition and grant the prayer thereof or render the judgment prayed for. The right to levy special assessments is derived solely from statutes, and a special statutory jurisdiction is conferred upon the county court

by the statute providing for an assessment. The court may obtain jurisdiction of the subject matter of a special assessment by the filing of a petition under some existing law, calling upon the court to act. If a petition based on any existing statute were presented the court would acquire jurisdiction over the subject, and if such jurisdiction once attached, no matter how erroneous the judgment might be, it would be binding, unless reversed in a direct proceeding. In this case the particular assessment provided for was without authority of law, and the ordinance was void as to such provision. The petition called upon the court to act under the void provision forbidden by the law, and the court could not, under it, enter any judgment for a different assessment. The court was merely asked to do something which it had no power to do in a matter not pertaining to its general jurisdiction, where jurisdiction must be derived from statute. We therefore held that the ordinance and petition did not confer jurisdiction. There remained, however, in the original ordinance the valid provision that the cost of the improvement should be paid by special assessment, and we adhere to our conclusion in *West Chicago Park Comrs. v. Farber, supra*, that it was a sufficient basis for the subsequent ordinance and proceeding to enforce the liability. We think the court was right in overruling the motion, based on the proposition that the original ordinance did not provide for any special assessment.

The statute under which this assessment was made contains a proviso, as follows: "Provided, that no improvement or sewer shall be made or constructed under the provisions of this section, except upon the petition of the owners of a majority of the land fronting on the proposed improvement or sewer." (Hurd's Stat. 1895, p. 1088, sec. 3.) The petition recites that the petitioner was requested and authorized to make the improvement by a petition in writing of the owners of a majority of the land fronting on said improvement, as required by said act.

At the close of the testimony on behalf of the appellee commissioners, appellants moved to dismiss the proceeding on several grounds, one of which (No. 5) was as follows: "That no petition of the property owners is proven, as required by the statute of 1878."

The ordinance adopted by the corporate authorities of the town of West Chicago, providing for the improvement in question, was received in evidence. It recited that the park commissioners had control of the boulevard to be improved and desired to improve the same, and had so notified the said corporate authorities of such town, and had presented to such corporate authorities plans, specifications and estimates of the cost of the improvement, and recited further as follows: "Whereas, the commissioners have submitted to the corporate authorities of the town of West Chicago a petition of the owners of a majority of the land fronting on the said improvement, duly verified by their engineer; and whereas, the corporate authorities of the town of West Chicago have found that said petition contains the signatures of the owners of a majority of the land fronting on said Douglas boulevard: Now, therefore, be it ordained," etc.

Exclusive jurisdiction and power to adopt ordinances providing for such improvements was conferred by law upon the said corporate authorities. The park commissioners were not, as they have been by later statutes, invested with power to adopt an ordinance, but were required to apply to the corporate authorities of the town for an ordinance under which the improvement might be made. The effect of the proviso hereinbefore quoted was to prohibit such corporate authorities from passing the ordinance in question unless petitioned to do so by the owners of a majority of the land fronting on the proposed improvement. Such a petition was a pre-requisite to the power of the corporate authorities to enact the ordinance. It was, therefore, of necessity, the official duty of such corporate authorities to ascertain, before assuming to act

on the question of the adoption of the ordinance, whether a petition which fulfilled the requirements of the statute was before them. It appears from the recitations of the ordinance a petition purporting to be that which the law demanded was laid before the corporate authorities, and that that body entered upon an official investigation in order to ascertain whether the petition met the requirements of the law, and the ordinance sets forth the result of such official action taken by such authorities. The ordinance recites that said corporate authorities, upon such official investigation, found the petition contained the signatures of the owners of a majority of the land fronting on said Douglas boulevard so proposed to be improved. This recitation we think properly receivable in evidence as *prima facie* proof of the facts recited. The corporate authorities of the town were, by the statute, invested with sole power in the premises, and were erected, by the statute, into an official body charged with the duty of acting impartially, in their official capacity, as between the park commissioners and the owners of private property which would be subject to the burden of special assessments in the event the improvement as proposed by the park commissioners should be carried into completion. The official duty first devolving upon the corporate authorities was to ascertain whether the owners of a majority of the land fronting on the proposed improvement had petitioned for the improvement. They discharged that duty. The clerk of the town was, by said section 3 of the act, expressly authorized and required to keep a record of the proceedings of said corporate authorities and record the ordinances adopted by them, to the same extent the clerk of a city or village is required and authorized to keep the records of the official acts of the city council or village board in proceedings for making improvements to be paid for by special assessments.

On the subject of the admissibility of public writings in evidence, Mr. Greenleaf, in his work on Evidence,

(vol. 1, secs. 483, 493,) says: "The next class of public writings to be considered consists of *official registers*, or books kept by persons in public office, in which they are required, whether by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties and under their personal observation. These documents, as well as all others of a public nature, are generally admissible in evidence notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth: the obligations of an oath, and the power of cross-examining the persons on whose authority the truth of the documents depends.

\* \* \* In regard to these *official registers*, we have already stated the principles on which these books are entitled to credit, to which it is only necessary to add, that where the books possess all the requisites there mentioned they are admissible as competent evidence of the facts they contain." The rule is referred to by Mr. Welty, in his work on Assessments, (sec. 280,) as follows: "When a petition is presented and a committee reports that it is signed by owners of a majority of frontage, and the report adopted and a proper record made of the proceedings, a *prima facie* case will be made of jurisdiction, and in all subsequent proceedings it will be presumed that the board acquired jurisdiction."

In *Wells v. Hicks*, 27 Ill. 343, we held the recitals in the record of the proceedings of the board of highway commissioners were competent to be received in evidence to show that certain notices, necessary to the jurisdiction of the commissioners, had been posted as the law required. In *Shinkle v. McGill*, 58 Ill. 422, we said: "It is made the duty of the commissioners, before determining to lay out any new road or to alter or discontinue any old one, to fix upon a time and place to hear any reasons which may be offered for or against the establishment or discontinuance of such road. Three notices of the time and place must be posted in three of the most public

places in the town, at least eight days previous to the time of meeting. There is no evidence of such notice in this record, except the recital in the final order establishing the road. The posting of these notices is a positive requirement of the statute and must be complied with. The question is, what is sufficient evidence of compliance? The final order, signed by the commissioners and deposited with the town clerk, does particularly specify that three notices were posted in three of the most public places in the town, eight days previous to the time of meeting. As we construe the statute, there can be no higher or better evidence of the fact. \* \* \* We think the full recital in the final order, of a strict performance of the duty, is sufficient to confer jurisdiction. The case of *Commissioners v. Harper*, 38 Ill. 103, is not similar to this in the facts. This court held in that case that the giving of the notice was a jurisdictional fact, which would never be presumed in a direct proceeding. In that case the facts as to the posting of the notice were not recited in the order declaring the road a public highway."

The ruling in the case of *Shinkle v. McGill, supra*, was approved in *Frizzell v. Rogers*, 82 Ill. 109, but in that case the record of the commissioners did not contain the recital necessary to confer jurisdiction, and there being no other proof thereof, it was ruled it did not appear the commissioners had jurisdiction to enter the order.

In *Board of Supervisors v. Magoon*, 109 Ill. 142, in disposing of the objection it was not proven the commissioners had posted the notices required by statute to authorize them to act, we said: "The commissioners recite, in the order entered at the hearing, that they met at the time and place named in the notice, and that is evidence that notice was given. (See *Wells v. Hicks*, 27 Ill. 343; *Frizzell v. Rogers*, 82 id. 109.) We are clearly of opinion the record shows that the highway commissioners had jurisdiction."

The rule to be deduced from what was said by Mr. Cooley in his work on Taxation, (8th ed. p. 465,) and by

Mr. Dillon in his work on Municipal Corporations, (4th ed. p. 800,) is, that when the assent or petition of a designated number of persons is necessary to the jurisdiction of the city council or the proper authorities to take official action, the finding of the council or body that the requisite number of persons had assented or petitioned for action on the part of said council or authorities is not conclusive of the jurisdictional fact, but is sufficient, in the absence of countervailing proof.

Many adjudged cases are cited by appellants as in support of their contention the recitals found in the record of the corporate authorities in the case at bar have no potency whatever as evidence that a lawful petition was presented. We have examined these authorities. It is impractical to attempt to review them. We think they may be divided into four classes: (1) Those wherein the rule is announced that a record showing merely that ultimate action was taken by an official body (not judicial in character) does not establish, even *prima facie*, that a fact necessary to the jurisdiction of the body to act existed; (2) those holding that a recital in a record of the proceedings of such a body that a jurisdictional fact existed was not conclusive of the existence of such fact, but might be made the subject of opposing testimony; (3) those where the facts recited were not sufficient to establish the jurisdictional fact; (4) those wherein it is held that on consideration of the recitals and all other testimony produced upon the point the existence of the jurisdictional fact was not maintained by the preponderance of the evidence.

We do not affirm authorities are wholly wanting to sustain the view that recitals of the character under consideration have no evidentiary force, but we venture to assert the overwhelming weight of authority is to the contrary, and that all well considered decisions will be found to fall within one or the other of the classes hereinbefore mentioned. In the case of *Thorn v. West Chicago*

*Park Comrs.* 130 Ill. 594, (an adjudication much relied upon by appellants,) the power of the commissioners to adopt an ordinance appropriating a street for the purpose of connecting a park boulevard or drive-way with other parts of the city, arose for determination. It was held such power could be exercised only by the consent, in writing, of the owners of a majority of the frontage of lands or lots on such street. The park commissioners adopted an ordinance appropriating portions of Twelfth street and Ogden avenue for the purpose of connecting Douglas Park with other portions of the city of Chicago. The ordinance provided for the improvement of said portions of said streets by special assessments. On the hearing of the application for the confirmation of the assessment roll the commissioners undertook to establish the necessary consent of the owners of property on said streets by producing a paper purporting to be a petition of such owners. The trial court received the petition in evidence over the objections of the objectors. This court held said petition was not competent to be received in evidence for the reason the signatures of such alleged consenting petitioners were not properly authenticated, and also because it did not appear that the alleged consenting petitioners were the owners of a majority of the land fronting on the proposed improvement. In disposing of the case it was said the fact this consent petition was acted upon by the commissioners, and that it was the duty of such commissioners, in the first instance, to determine whether the owners of a majority of the land involved had consented to the appropriation of the street, could have no effect to establish that the commissioners had jurisdiction to carry out the powers conferred by the statute. It will be observed the commissioners in that case voluntarily elected to attempt to prove in the trial court the requisite consent that the streets might be appropriated as contemplated by the ordinance, by the production of the written consents in the nature of a pe-

tition in writing. The trial court held such written petition made a *prima facie* case for the commissioners. The objectors appealed. This court found the writing so produced was wholly insufficient to authorize the commissioners to act, and declared the fact the commissioners were required, in the first instance, to determine for themselves whether the requisite number of property holders had consented to the proposed appropriation of the streets, and that said commissioners had determined they had jurisdiction to act from an inspection and consideration of the petition, could have no effect as presumptions in favor of the authority of the commissioners to adopt the ordinance. The commissioners having voluntarily produced as evidence a petition as constituting their authority to act, and such petition proving to be wholly insufficient to sustain such claim, it would have been beyond reason to hold that the jurisdiction of the commissioners could be established and the judgment appealed from affirmed on the ground they considered the petition to be sufficient and had acted upon it in that view. The decision cannot be regarded as the declaration of this court that the recitals of fact of the commissioners in an ordinance that the requisite petition had been presented could not be availed of in the trial court as *prima facie* proof of the truth of the facts recited. We think the recital in such an ordinance of the finding of the corporate authorities that a preliminary fact necessary to confer jurisdiction and power on them to act existed is sufficient *prima facie* evidence of the existence of such fact. If the truth of the recital be challenged by testimony having a controverting tendency it becomes an issue of fact, and the burden rests upon the commissioners to sustain the truth of the recital by a preponderance of all the testimony bearing upon the point.

There is no force in the insistence the facts so recited are insufficient to show the requisite petition was before the said corporate authorities. True, the prayer of the

petition is not recited. It is recited that the park commissioners desired to improve the boulevard, and had delivered to the corporate authorities plans, specifications and estimates of the cost of the proposed improvements, together with a petition of the owners of a majority of the land fronting on said improvement, and that the corporate authorities determined the petition contained the signatures of the owners of the majority of the land fronting on said proposed improvement. The proviso of the statute making a petition necessary is, that "no improvement shall be made or constructed except upon the petition of the owners of a majority of the land fronting on the proposed improvement." The recital is as broad as the statute, and the context discloses with unmistakable certainty that the petition was that which the statute required should be filed. Whether the improvement should be paid for out of the general tax fund or wholly or in part by special assessment or special taxation was wholly for the corporate authorities to determine. The manner of raising the fund was not a matter to be referred to in the petition, hence no recital as to the prayer of the petition in that respect was necessary.

The plans and specifications adopted by the ordinance provided that a strip sixty feet in width on each side of the boulevard should be improved, the intervening space being a parkway. The strips to be improved were parts of the same general boulevard and would be connected by intersecting streets. The corporate authorities were justified in regarding the entire enterprise as but one and a single improvement. *City of Springfield v. Green*, 120 Ill. 269; *Church v. People*, 179 id. 205.

The evidence was properly held insufficient to show that, as was claimed, a large sum included in the assessment was expended in defraying the cost of improving the parkway which intervened between the strips the ordinance provided should be improved.

Prior to the adoption of the ordinance a "gravel roadway" had been constructed along the boulevard. This roadway was located within the limits of the strip to be improved on the side of the boulevard, upon which the property of some of the appellants abutted. Whether the property so adjacent to this gravel road should be regarded as having received as great benefit from the improvement made under the ordinance as other property which abutted on the other side of the highway was the subject to which the testimony of a number of witnesses was devoted. The testimony was not harmonious. We incline to agree with the trial court that no distinction in the matter of benefits ought to be made, under the evidence, because of the previous existence of the gravel roadway.

We do not think the appellant Lombard has any just ground of complaint as to the amount assessed against his lots. In the judgment under the prior void ordinance the benefits to his property were assessed at the sum of \$1000. The appellant Lombard, in his objection, says this assessment of \$1000 was by an agreement of the parties, and that afterwards a subsequent agreement was entered into that he should pay the appellees the sum of \$2000, making a total of \$3000 to be paid by him. The benefit to his property was assessed at \$3800. It seems from the testimony the commissioners claimed a building line had been established on Lombard's property which restricted the erection of buildings thereon within fifty feet of the line of the boulevard. His lots were but ninety-two feet, or thereabout, in depth, and but about forty-two feet remained available for buildings, and the assessment of benefits in the sum of \$1000 was based upon the alleged existence of such building restrictions. It appeared that Lombard subsequently filed a petition under the Burnt Records act to establish title to the premises, and made the park commissioners parties defendant, for the purpose of procuring a decree declaring the property free

from such building line. A decree was entered in that proceeding by consent, so far as it touched upon that question. The arrangement was, Lombard's property should be assessed \$2000 and the building line should be placed at ten feet from the margin of the boulevard. Subsequently the decree was vacated as to the park commissioners and a final decree entered declaring the property to be free from any building restrictions whatever. The court correctly held the property of the objector Lombard was subject to assessment in the amount it should be found to have been benefited by the improvement, without regard to the former judgments or agreements, for the reason all of such judgments and agreements were avoided by the rendition of the decree, at the instance of said Lombard, relieving his lots from all restrictions whatever as to the location of buildings thereon.

Believing the record to be free from error the judgment appealed from is affirmed. *Judgment affirmed.*

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EMMA J. GLOS

v.

JOHN S. HUEY.

*Opinion filed October 13, 1899.*

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1. **CLOUD ON TITLE**—*what proof essential to maintain bill to remove cloud.* To maintain a bill to remove a cloud from the title to real estate, the owner must show either that he is in possession or that the property is vacant and unoccupied.

2. **EVIDENCE**—*mere deed without proof of possession does not prove title.* Proof of possession under claim of ownership is *prima facie* evidence of such ownership in the claimant so in possession, but a mere deed from a third person, without further proof as to possession or title, does not prove title.

**APPEAL** from the Superior Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding.

ENOCH J. PRICE, for appellant.

JOHN S. HUEY, *pro se.*

Mr. JUSTICE CARTER delivered the opinion of the court:

The appellee obtained a decree in the court below against Jacob Glos and the appellant, setting aside a certain tax deed to Jacob Glos, and a quit-claim deed from him to the appellant, as clouds upon the complainant's title.

The bill alleged that the complainant (appellee here) was the owner in fee of the property, and that it was vacant and unoccupied. These were material allegations, and, being denied by the answer of appellant, should have been proved. It does not appear from the evidence whether any person was in possession of the premises or whether they were vacant and unoccupied. To maintain a bill to remove a cloud from the title to real estate the owner must show either that he is in possession or that the property is vacant and unoccupied. (*Glos v. Randolph*, 133 Ill. 197; *Johnson v. Huling*, 127 id. 14.) The only proof to sustain complainant's allegation that he was the owner in fee of the property was a warranty deed from William H. Colvin. No proof was made that Colvin ever had any title to or was ever in possession of it. Proof of possession under claim of ownership is *prima facie* evidence of such ownership in the claimant so in possession, (*Harland v. Eastman*, 119 Ill. 22,) but a mere deed from a third person, without further proof as to possession or title, does not prove title. *Anderson v. McCormick*, 129 Ill. 308; *Sedgwick & Wait on Trial of Title to Land*, sec. 792.

The decree must be reversed and the cause remanded.  
*Reversed and remanded.*

## THE CITY OF CENTRALIA

v.

EDWARD NAGELE.

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183 644*Opinion filed October 13, 1899.*

1. APPEALS AND ERRORS—*the Supreme Court is bound by Appellate Court's recitals of fact.* Whether one prosecuted for violating a city ordinance against peddling is "an itinerant merchant" or "a transient vendor of merchandise," within the meaning of the ordinance, is a question of fact or a mixed question of law and fact, upon which the finding of the Appellate Court, by recital in its judgment, is conclusive.

2. ORDINANCES—*ordinance requiring license for peddling construed.* An ordinance imposing a license tax upon "whoever shall temporarily establish or open up a place of business for the purpose of selling, bartering or exchanging any goods, wares or merchandise, or other article of value, being an itinerant merchant or transient vendor of merchandise," is applicable only to itinerant merchants or transient vendors, and not to every one who temporarily conducts such a place of business.

3. MUNICIPAL CORPORATIONS—*city not liable for costs in an action to enforce city ordinance.* In an action to enforce a city ordinance it is error for the Appellate Court to adjudge costs against the city and award execution on reversing the judgment of conviction.

*Nagele v. City of Centralia*, 81 Ill. App. 334, reversed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on writ of error to the Circuit Court of Marion county; the Hon. TRUMAN E. AMES, Judge, presiding.

JOHN J. BUNDY, (FRANK F. NOLEMAN, and W. F. BUNDY, of counsel,) for appellant.

VANHOOREBEKE & LOUDEN, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This is an appeal from the judgment of the Appellate Court for the Fourth District, reversing and not remanding the judgment of the circuit court of Marion county finding the appellee to be guilty of a violation of sections

2 and 3 of chapter 21 of the ordinances of the appellant city and adjudging a fine in the sum of \$15 against him. The Appellate Court granted a certificate of importance.

Said sections 2 and 3 of the said ordinances are as follows:

"Sec. 2. That all itinerant merchants and transient vendors of merchandise, who shall sell or offer for sale, barter or exchange, any goods, wares or merchandise, or other article of value, from house to house in this city, or upon the public streets, avenues or other public grounds of this city, shall pay for a license so to do not less than \$2 nor more than \$10 for each day they shall pursue said calling within this city.

"Sec. 3. Whoever shall temporarily establish or open up a place of business in this city for the purpose of selling, bartering or exchanging any goods, wares or merchandise, or other article of value, being an itinerant merchant or transient vendor of merchandise, shall pay for a license so to do not less than \$2 nor more than \$20 per day for each day he shall conduct or maintain said business, and whosoever shall violate the provisions of this section shall be subject to a fine of not less than \$10 nor more than \$200 for each day he shall conduct such business without having obtained such license."

The Appellate Court incorporated in its judgment, as a finding of fact, that the appellee, "under the evidence, was not an itinerant merchant nor a transient vendor of merchandise." The propositions of law tendered to the circuit court did not ask definitions of "an itinerant merchant" or "a transient vendor of merchandise." Whether appellee acted in either of those capacities was a question of fact or a mixed question of law and fact. The judgment of the Appellate Court is conclusive and final on either of such questions. (*Capen v. DeSteiger Glass Co.* 105 Ill. 185; *Meyer v. Butterbrodt*, 146 id. 131; *Trustees v. Bruner*, 175 id. 307; *Banfill v. Twyman*, 172 id. 123.) The penalties of each of the sections of the ordinance are

leveled only against an itinerant merchant or a transient vendor of merchandise. As to this, section 2 is so clear that its meaning is not challenged. Section 3 does not purport to apply to every one who should temporarily establish or open up a place of business for the purpose of selling, bartering or exchanging goods, wares or merchandise in the city, but only to itinerant merchants or transient vendors of merchandise. The true meaning of the section is the same as if its phrases were so transposed as to read, "Whoever, being an itinerant merchant or transient vendor of merchandise, shall temporarily establish," etc. Accepting, as we must, the finding of the Appellate Court that appellee was not either an itinerant merchant or a transient vendor of merchandise as conclusive of those questions, it is manifest the validity or invalidity of the ordinance, to which the briefs of counsel are largely addressed, is not involved in the determination of the question of the correctness of the judgment of the Appellate Court. It being established by the proofs the appellee had not violated either section of the ordinance, the judgment of the Appellate Court that the judgment of the circuit court should be reversed logically and legally followed.

The judgment of the Appellate Court, by inadvertence, no doubt, adjudged costs in favor of the appellee against the appellant city and awarded execution therefor. The city is not liable for costs accruing in the case. *City of Carrollton v. Bazzette*, 159 Ill. 284.

The judgment of the Appellate Court awarding costs against the appellant city and directing the issuance of execution and fee bill therefor is reversed, otherwise the judgment appealed from is affirmed.

*Judgment reversed in part.*

EDWIN A. CASEY *et al.*

*v.*

CHARLES A. KIMMEL.

*Opinion filed October 13, 1899.*

1. TRIAL—*right of court to permit amendment of declaration on motion in arrest—parties.* The court may properly, upon the hearing of a motion in arrest of judgment, permit the plaintiff to amend his declaration so as to include as defendants parties whose names had been omitted by mistake from a prior amended declaration but who appeared and defended the action.

2. EVIDENCE—*proof that grantee's grantors were in possession raises a presumption of title in him.* Evidence that a grantee's predecessors in title were, when they conveyed the property, in possession under a claim of ownership, and that the grantee took possession under the conveyance to him, raises a presumption of title in him.

3. EJECTMENT—*trespasser cannot set up outstanding title in stranger.* A mere trespasser cannot, in an ejectment suit brought against him, set up an outstanding title in a third person.

4. SAME—*facts under which ejectment may be maintained.* One who derives title from an occupant of land claiming ownership and takes possession of the property, which he leases to a tenant, may maintain ejectment against trespassers who entered upon the premises as vacant and abandoned.

APPEAL from the Circuit Court of Peoria county; the Hon. T. M. SHAW, Judge, presiding.

WINSLOW EVANS, and JACK & TICHENOR, for appellants:

Before a plaintiff can establish a title by conveyance from an immediate or remote grantor, based on the prior possession and claim of ownership of such grantor, he must show that such immediate or remote grantor was in possession of the premises in dispute, claiming to own the same, at the time he made the conveyance through which plaintiff claims. *Anderson v. McCormick*, 129 Ill. 316.

While prior possession amounting to a visible and exclusive appropriation and use of a tract of land by a person claiming to own the same is evidence of a fee, it is the lowest possible. *Keith v. Keith*, 104 Ill. 397.

The possession to raise a presumption of ownership in fee must be actual, open, notorious and adverse. *Jackson v. Town*, 4 Cow. 602; 2 Blackstone's Com. 196; *Keith v. Keith*, 104 Ill. 397.

The plaintiff must recover on the strength of his own title. The defendant can rely on his possession in entire safety, and unless the plaintiff shows a good title the defendant cannot be disturbed in such possession, no matter whether he has title or is a mere intruder and trespasser. *Hague v. Porter*, 45 Ill. 318.

CHAS. A. KIMMEL, and PHILIP E. MANN, for appellee:

Prior possession alone is evidence of a fee sufficient as against a mere intruder. *Keith v. Keith*, 104 Ill. 339.

In actions of ejectment, and trespass for injuries to the inheritance by a person claiming title in fee simple, proof of actual possession is presumptive evidence of title in him to that extent, and throws upon the party contesting his title the burthen of rebutting the presumption thus raised. *Mason v. Park*, 3 Scam. 532; *Bowman v. Weitig*, 39 Ill. 416; *Dills v. Hubbard*, 17 id. 241; *Bank v. Goddard*, 23 id. 607; *Coombs v. Hertig*, 162 id. 171; *Harland v. Eastman*, 119 id. 22.

In actions of ejectment proof of possession of land by a party claiming to be the owner in fee is *prima facie* evidence of his ownership and seizin of the inheritance. *Anderson v. McCormick*, 129 Ill. 308.

The direction by the court to the jury was proper because plaintiff had made out a case by *prima facie* proof, and, there being no defense and no rebutting evidence, his right to a verdict followed as matter of law. *Cochran v. Ellis*, 125 Ill. 496; Andrews' Practice in Sup. Ct. Ill. 186.

Mr. JUSTICE CARTER delivered the opinion of the court:

In October, 1897, appellee brought ejectment against Casey and others to recover the south half of the north half of the north-west quarter of the north-west quarter

of section 22, township 9, north,—a ten-acre tract of land in Peoria county. Later, by amendments, the parties defendant were changed, except as to Casey, and after the evidence was heard on the last trial the plaintiff dismissed as to James M. Morse, who had been made a defendant, and the court then instructed the jury to find the defendants, Casey and Oglesby, guilty, etc. Motions for a new trial and in arrest of judgment were overruled, and said last named defendants appealed.

It seems that the last amended declaration named only Morse as defendant, but the cause was tried and defended by appellants, and, their names having been omitted from the declaration by mistake, the court, during the hearing of the motion in arrest of judgment, permitted the plaintiff to amend his declaration so as to include them of record as defendants. There was no error in allowing this amendment.

But it is contended that the court erred in directing a verdict for the plaintiff. The plaintiff's title was derived by *mesne* conveyances from Moses Stringer, who settled upon the quarter section containing the ten acres in controversy in 1838, but owing to a defect in the proof the plaintiff was unable to connect him with the patent title. The evidence showed, however, that he lived upon and improved a part of the quarter section for many years, and tended to prove that he claimed to own it, but there was no evidence, specifically applicable to the tract in controversy, that Stringer improved it, claimed to own it or exercised any acts of ownership over it, except that it was a part of the quarter section the south half of which he improved, and that he sold and conveyed it, having made the first conveyance in 1851, in the chain of title which ended in the plaintiff in 1890. Being unable to trace his title beyond Stringer, the plaintiff, to make a *prima facie* case, sought to prove, first, that when said Stringer conveyed this tract he was in possession claiming to own it; second, that other intermediate grantors,

when they conveyed, were in possession claiming to own it; and finally, that he entered into possession of the same property under his deed in 1890, and held possession of the same until appellants intruded and took possession, in 1895. If the plaintiff succeeded in proving either of the propositions mentioned he thereby established a *prima facie* case and was entitled to judgment, unless the presumption thus raised in his favor was overcome by the defendants. (*Anderson v. McCormick*, 129 Ill. 308; *Barger v. Hobbs*, 67 id. 592; *Herbert v. Herbert*, Breese, 354; *Mason v. Park*, 3 Scam. 532; *Keith v. Keith*, 104 Ill. 397; *DeWitt v. Bradbury*, 94 id. 446; *Bowman v. Wettig*, 39 id. 416; *Metropolitan Bank v. Godfrey*, 23 id. 579; *Coombs v. Hertig*, 162 id. 171; *Harland v. Eastman*, 119 id. 22.) Appellants had no title whatever, but claimed that the land was vacant and unoccupied, had been abandoned, and that they were entitled to hold it against the plaintiff,—first, because he had failed to prove title in himself; and second, because they had proved title in fee in a third person. They did not claim under nor connect themselves with the title of such third person in any way. Being mere trespassers and without title appellants could not set up an outstanding title in another. *Anderson v. Gray*, 134 Ill. 550.

Without considering whether or not the possession of Moses Stringer was sufficiently proved, we are of the opinion that the evidence showed that Lowell Harrison, a subsequent grantor in appellee's chain of title, was, at the time he conveyed, in possession and claiming to own the land; also, that after appellee purchased, in 1890, he leased it to one Schwartz for a period of five years ending January, 1896; that Schwartz took possession as appellee's tenant and cultivated a part of the ground, and then, with the consent of appellee, assigned the lease to one Gilbert, who laid out the tract into lots, with streets running through it, and put up signs showing the names of the streets, and that appellee's possession was thus

established. There were remnants of an old fence on the land. In July, 1895, Morse, with a force of men, went upon the premises and built a wire fence, and soon after Casey took possession and leased to Oglesby,—whether by the connivance of Morse does not appear, but, in any event, without any right whatever, so far as the evidence disclosed. We are of the opinion that under this state of the proof appellee was entitled to a verdict in his favor, and that any other verdict would necessarily have been set aside.

The instruction to find for the plaintiff was properly given, and the judgment must be affirmed.

*Judgment affirmed.*

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THE MILWAUKEE MECHANICS' INSURANCE COMPANY

*v.*

R. J. GRAHAM, for use, etc.

*Opinion filed October 13, 1899.*

1. INSURANCE—*in absence of payment of premium a promise to pay is essential if policy is not delivered.* A binding contract of insurance is not effected when there is neither a delivery of the policy, payment or tender of the premium, nor a promise to pay it.

2. APPEALS AND ERRORS—*when erroneous modification of instruction is not prejudicial.* The modification of an instruction so as to exclude the right of a party to make a valid parol contract of insurance by promising to pay the premium is not prejudicial, if no promise is shown and the property was covered by other insurance.

3. SAME—*errors not contributing to verdict are not ground for reversal.* A verdict right upon the facts found will not be disturbed for errors in giving and refusing instructions which could not have contributed to the verdict.

*Milwaukee Mechanics' Ins. Co. v. Graham, 80 Ill. App. 549, affirmed.*

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Pike county; the Hon. T. N. MEHAN, Judge, presiding.

E. A. PERRY, for appellant.

MATTHEWS & GRIGSBY, for appellee.

Per CURIAM: After a careful consideration of this case we have come to the same conclusion and entertain the same views as are expressed in the opinion of the Appellate Court, delivered by Mr. Justice HARKER. That opinion will therefore be adopted as the opinion of this court also. It is as follows:

"Appellee is the owner of a fruit evaporating plant at Pittsfield, Illinois. On the 27th of October, 1897, C. K. Graham, his operating manager, procured from F. W. Niebur, agent of the Milwaukee Mechanics' Insurance Company, a fire insurance policy on the machinery and fruit on hand. The policy was delivered but the premium was not paid, the agent declining to receive it until he should learn from the company whether it would carry the risk. It was provided in the policy that the contract should become void if other insurance on the property should be procured without consent of the company, and that the policy might be canceled at any time by giving five days' notice. On the 30th of October Niebur received notice from the company that it would not carry the risk, and directing him to cancel the policy. He at once sent a note to C. K. Graham informing him that his company declined the risk and requesting him to procure other insurance. Graham, at noon of the same day, called at the office of E. A. Burk, another insurance agent, showed the note to him, 'gave him the particulars,' and asked him if he could write the risk in some company represented by him. Burk replied that he thought he could, whereupon Graham left the office, promising to call again. Burk at once wrote a policy in the Hanover Insurance Company of New York on one of the blanks furnished him, with the signatures of the president and secretary, covering the property from October 30 to No-

vember 30, 1897, countersigned it himself and entered it in his register of policies. The policy was not delivered to Graham, the premium was not paid by him, nor did he promise to pay it. That night the property was destroyed by fire. This suit was commenced against appellant on the first named policy, and was defended upon the ground that Graham had waived his right to have the policy continue in force five days after notice of cancellation, and that the policy became void by reason of a contract of insurance effected with the agent of the Hanover Insurance Company. A trial by jury resulted in a verdict and judgment against the appellant for the full amount named in the policy.

"It is clear that the right of appellee to recover depends entirely upon whether he consummated a contract of insurance with the Hanover Insurance Company. By its own terms the policy sued on was to continue in force for five days after cancellation unless other insurance was effected. The risk was with appellant, within the five days, up to the instant it should be assumed by another company and agreed to by the insured.

"While it is not necessary, in order to hold an insurance company to liability for a loss, that the policy shall have been delivered or the premium paid, in a case where the policy has not been delivered nor the premium paid or tendered a promise to pay the premium is necessary. Without a promise to pay for the insurance the undertaking of the company would be *nudum pactum*. It is fundamental that unless the parties have come to an agreement as to the terms of their contract, so that nothing remains to be done but to execute what has been agreed upon, the contract is still incomplete and of no binding force upon either party. We can see no reason for departing from that familiar rule in the law of contracts in a case where the parties were negotiating over a contract of insurance. In the case at bar there was neither a delivery of the policy, a payment of the pre-

mium, a tender of the premium nor a promise to pay. The matter was in an incomplete condition at the time of the fire, and there was no such contract effected as could render the Hanover company liable.

"The trial court entertained the view that in order to render a contract of insurance valid and binding, a delivery of a policy, a payment of the premium or a tender of it is necessary, and so told the jury in modified instructions. That, of course, was erroneous. The right to make a parol contract of insurance is recognized by our courts, and the contract may be completed by the mere promise of the insured to pay the premium. But as there was not even a promise made to the agent of the Hanover company to pay the premium, and we are clearly of the opinion that the policy of appellant was in force at the time of the fire, no harm resulted from the modification of those instructions.

"The judgment is right, and no such error intervened as would justify a reversal."

The trial court submitted the following question of fact, which the jury answered in the negative, viz.: "Did E. A. Burk, as agent of the Hanover Insurance Company, subsequent to the issuing of the policy sued on and prior to the alleged loss, agree with the plaintiff, or some one for him, to issue a policy in the said Hanover company on the property covered by the policy sued on?" In view of this finding of fact the alleged errors in giving and refusing to give certain instructions could not have contributed to the verdict, which verdict was right upon the facts found, and should not be disturbed even if such errors were conceded.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

181	169
182	311
181	162
185	376
86a	182

FRANCES A. GADWOOD *et al.**v.*JAMES KERR *et al.**Opinion filed October 13, 1899.*

1. PRACTICE—*section 72 of Practice act construed.* The requirement of section 72 of the Practice act, that “authenticated copies of records of judgments, orders and decrees appealed from” shall be filed in the office of the clerk of the Supreme Court or Appellate Court before the second day of the succeeding term, is not complied with by filing within the time prescribed an authenticated copy of the decree or judgment order merely, but a transcript of the record, or what purports to be a transcript, must be filed, in default of which the court is without power, after the second day of the term, to permit a complete record to be filed.

2. SAME—*bill of exceptions cannot be taken to proceedings of Appellate Court.* A bill of exceptions cannot be taken to review a decision of the Appellate Court made in the exercise of its jurisdiction as a court of error. (*Pardridge v. Morgenthau*, 157 Ill. 395, followed.)

3. SAME—*appeal is properly dismissed if transcript is not filed in time.* An appeal is properly dismissed upon the appellant's failure to file, within the time prescribed, the transcript of the record required by section 72 of the Practice act or to obtain an extension of time in which to file it.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

WILLIAM T. BLAIR, for appellants.

SHERMAN & BURTT, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

The appellees obtained a decree of foreclosure and sale in the circuit court of Cook county, from which the appellants took an appeal to the Appellate Court and within the time fixed by statute had their cause docketed, but filed within that time only a transcript of an order setting aside a decree of sale, and of a subsequent decree of sale, and the order allowing the appeal and the

appeal bond. Subsequently, and after the second day of the term of the Appellate Court, the appellants suggested a diminution of the record, and moved in that court for leave to file a complete record *instanter*. The motion was denied, and the court on its own motion entered judgment dismissing the appeal, and for costs against appellants. This decision of the Appellate Court is assigned for error by appellants on this appeal.

The 72d section of the Practice act provides that "authenticated copies of records of judgments, orders and decrees appealed from shall be filed in the office of the clerk of the Supreme Court or of the Appellate Court, as the case may be, on or before the second day of the succeeding term, \* \* \* otherwise the said appeal shall be dismissed, unless further time to file the same shall have been granted by the court to which said appeal shall have been taken, upon good cause shown." The contention of appellants is, that the statute is complied with by filing within the time prescribed an authenticated copy of the decree or judgment order merely, and that this having been done by appellants it was error not to allow them to file the complete record after the time limited by the statute, and to dismiss their appeal. We cannot agree to this construction of the statute. "Authenticated copies of judgments, orders and decrees appealed from," mean authenticated copies of the records made in the cause in which the judgment or decree appealed from is rendered. This is the construction which the bench and bar of this State have always placed upon this statute. (*Patterson v. Stewart*, 104 Ill. 104; *Pardridge v. Morgenthau*, 157 id. 395; *Rowan v. Bowles*, 25 id. 97; *Stevison v. Earnest*, 80 id. 513; *Freeland v. Board of Supervisors of Jasper County*, 27 id. 303; *Cook v. Cook*, 104 id. 98.) In the latter case this court said, that "if the appellant was unable within that time" (the time limited by the statute) "to procure a complete transcript, then he should have filed a transcript of so much of the record as could be

obtained, and within the time so prescribed for filing the same should have made an application for an extension of time to complete the record." In the case at bar the application for leave to file the transcript of record was not made until after the second day of the term, when the court had no power to allow the record to be filed.

It must not be understood by what has been said that the court, on appeal, has no power after the second day of the term to allow a supplemental or additional transcript of portions of the record to be filed which have been omitted from the original transcript, but only that that which purports to be the transcript of the record must be filed within the time fixed by the statute, or within such further time as shall have been granted by the court. So far as the practice in this court is concerned, what the transcript should contain is indicated by its rules of practice in force November 4, 1897. The transcript filed within the statutory time in the case at bar in the Appellate Court did not purport to be anything more than an authenticated copy of the order, and the decree before mentioned, and of the appeal bond. If appellants were unable, for any sufficient reason, to obtain a transcript of the record in the case, they should, before the expiration of the time for filing, have applied to the court for leave to file the transcript or for an extension of time in which to file it. This they did not do, and their appeal was properly dismissed. But even if the Appellate Court had the power to grant, in the exercise of its discretion, the leave asked, it does not follow that this court has the power to review its decision in refusing such leave. No bill of exceptions can be taken to the proceedings of that court, and we can only review the record as it comes to us. No further discussion of this branch of the question is necessary than that given to it in *Pardridge v. Morgenthau*, 157 Ill. 395.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

## CHRISTIAN KUGLIN

*v.*

## FREDERICK BOCK.

*Opinion filed October 13, 1899.*

**BOUNDARIES**—*original monuments are better evidence than field notes, maps or plats.* Monuments of the original survey are more satisfactory evidence of the boundaries of city lots than field notes, maps or plats.

APPEAL from the Superior Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding.

GOLDZIER & RODGERS, for appellant.

KERR & BARR, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

Kuglin brought ejectment against Bock to recover part of lot 43 in Benjamin Johnson's subdivision of the south-east quarter of the south-east quarter of section 4, township 38, north, range 14, east, in Cook county. Trial by jury was waived, and the court found the defendant not guilty and entered judgment accordingly. Kuglin appeals.

Kuglin, who had owned lots 43 and 44 for several years and resided upon lot 43, sold and conveyed to Bock, in 1880, lot 44, which adjoined lot 43 on the south. Kuglin and Bock measured the lot sold with a tape line, which lot was twenty-five feet front by one hundred and twenty-five feet in depth, and fixed the boundaries in accordance, as the evidence tends to prove, with the stakes set by the surveyor in laying out the subdivision. Bock erected a dwelling house on the lot so staked off a few weeks after the purchase. Kuglin observed the location and the work on the house from day to day, but made no objection. In 1894, after a survey, he brought this suit, alleging that Bock's house, fence and barn were in part located on his

lot 43,—that they extended over on lot 43 from three to five feet. Bock's defense, as set up in his several pleas, was, that he was not guilty; that he was not in possession of said alleged part of lot 43, and that Kuglin was estopped by his conduct from claiming the premises in controversy. The issues tried were made up on these pleas.

The arguments of counsel have been devoted chiefly to the question raised on the trial by the plaintiff,—that ejectment cannot be defeated by estoppel *in pais*, but that such a defense can be availed of only in equity,—and reference is made to *St. Louis Stock Yards v. Wiggins Ferry Co.* 102 Ill. 514, *Same v. Same*, 112 id. 384, *Winslow v. Cooper*, 104 id. 235, *Baltimore and Ohio and Chicago Railway Co. v. Illinois Central Railroad Co.* 137 id. 9, *Linnertz v. Dorway*, 175 id. 508, and other cases. Reference is also made to cases deciding that parties may settle disputed boundary lines and agree upon a line between their lands, and that such an agreement may rest in parol, and when proved in ejectment the line agreed upon will prevail, even over the true line. But we deem it unnecessary to follow counsel upon these questions, for the reason that we are unable to find that the judgment is against the evidence, or the weight of it, upon the question raised as to the true line between the two lots. The burden was upon the plaintiff, Kuglin, to prove title in himself to the strip in controversy by showing it was part of lot 43, and this he did not do, unless the survey made by his principal witness was shown to be correct. It appears, however, in making this survey he began at a notch or mark made upon the curb by some other surveyor and followed the field notes of such other surveyor, and there was no evidence that they were correct. The evidence tends strongly to prove that the house, barn and fence of Bock were altogether on lot 44 as the lots were located by the original survey shown by the stakes of such survey. It is well settled that monuments of the original survey are more

satisfactory evidence of the boundaries of city lots than field notes, maps or plats. *City of Decatur v. Niedermeyer*, 168 Ill. 68, and cases there cited.

The judgment is right and must be affirmed.

*Judgment affirmed.*

181 167  
206 30

W. BAILEY REXROAT

*v.*

DAVID K. VAUGHN.

*Opinion filed October 13, 1899.*

**DEEDS**—evidence must be clear to warrant reformation of deed to include land not covered. A deed will not be reformed, in equity, on the ground of mutual mistake, so as to include land not covered by it, in the absence of clear and satisfactory evidence.

APPEAL from the Circuit Court of Morgan county; the Hon. JAMES A. CREIGHTON, Judge, presiding.

H. G. WHITLOCK, for appellant.

R. W. MILLS, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

Appellant, Rexroat, brought his bill in the court below to reform a deed so as to include in it a thirty-acre tract which he alleges he purchased, with other lands, from appellee, Vaughn, and which was by mistake omitted from the deed. Vaughn's defense was, that he had not sold or agreed to convey to Rexroat said thirty acres, but that Rexroat had obtained from him the rest of his lands (about one hundred and thirty-eight acres) for an inadequate consideration and while he was intoxicated, which intoxication he alleged was induced by Rexroat.

The substance of the case is, that in 1888 Vaughn, then twenty-two years old, inherited from his father one hundred and twenty acres of land in Morgan county and forty-

eight acres in Cass county. Thirty acres of said one hundred and twenty acres, and the forty-eight acres, were assigned to the widow as her homestead and dower, and appellee came into possession of the rest—ninety acres. Rexroat owned and lived upon a large farm adjoining, and he and appellee, both addicted to strong drink, became friendly and intimate, and frequently went together to the city of Jacksonville, where they patronized saloons liberally and often returned home in a state of intoxication. Rexroat loaned money to Vaughn, which Vaughn squandered. Vaughn had also become indebted to others, which indebtedness was in part secured by a mortgage and part by judgment liens. While thus financially involved and pursuing a course of reckless dissipation, the evidence shows that Vaughn desired to sell his lands and offered them for sale to other parties besides Rexroat, and finally, in pursuance of a verbal agreement, did convey to Rexroat said ninety acres and said forty-eight acres in consideration of the satisfaction of a mortgage for \$1500, dated March 22, 1889, and a certificate of redemption of \$960, dated September 20, 1890, and of the payment of \$3485 in cash, but whether or not the thirty-acre tract was by the agreement of sale to have been included in the transfer is not altogether clear from the evidence. Rexroat testified that it was, and that he supposed it was described with the other lands in the deed, and did not know that it was omitted until long afterward, when he had an abstract prepared. Vaughn testified it was not included in the agreement of sale, and that by the agreement the crops on the land were reserved to him, but that Rexroat took possession and kept them. Several witnesses testified that Vaughn had said, soon after the transaction, that he had sold all of his land to Rexroat and that the latter had dealt honorably with him. The evidence shows that the consideration paid was inadequate for all of the land, including the thirty-acre tract, although part of it was encumbered by the life

estate of the widow of Vaughn's father for dower. The scrivener who drew the deed did not testify, nor does it appear how he obtained the description of the property which he included in the deed, nor what the circumstances were that attended the preparation, execution and delivery of the deed. Rexroat testified that the verbal contract was that he was to pay, and that he did pay, \$6000 for all the land, including the thirty acres, but not that he was to pay any particular price per acre. The evidence shows that the ninety acres were worth substantially this amount without the matured crop.

Upon this evidence we are asked to find that the solemn contract of the parties, as evidenced by the deed, is not the real contract, but that by the mutual mistake of the parties it failed to convey all the lands actually sold by Vaughn and paid for by Rexroat. The evidence is too uncertain and contradictory to authorize such a finding. The rule is, that to authorize a court of equity to reform a written agreement or a deed of conveyance between parties on account of mistake, the mistake must be that of both; and must be proved by clear and satisfactory evidence, and until the mistake is satisfactorily shown the written instrument will be presumed to state correctly the intention of the parties. (*McDonald v. Starkey*, 42 Ill. 442; *Sutherland v. Sutherland*, 69 id. 481; *Cleary v. Babcock*, 41 id. 271.) The evidence in the case at bar is not sufficiently clear and satisfactory to authorize a court of equity to reform the deed. The decree asked for would, of course, in effect, be equivalent to a decree for a specific performance of the contract to convey the thirty acres for the consideration paid. We are satisfied that a court of equity would not be justified in granting such relief upon the evidence in this case.

The decree of the circuit court is right and must be affirmed.

*Decree affirmed.*

JOHN J. WILSON

v.

ALFRED LOWMASTER.

*Opinion filed October 13, 1899.*

1. **JUDICIAL SALES**—when service of notice of judgment against decedent is insufficient to authorize execution sale. An execution sale of the lands of a decedent, made upon written notice to the heirs under section 39 of the act on judgments, as amended in 1875, (Laws of 1875, p. 86,) is invalid, where the notice to one of the resident heirs was not personally served or sent by mail, but was delivered to a member of her family.

2. **EVIDENCE**—plaintiff in ejectment relying on an execution sale must prove compliance with statute. A plaintiff in ejectment claiming under an execution sale of the land of a decedent made upon notice to the heirs under section 39 of the act on judgments, has the burden of showing that the notice was given as required by statute.

**APPEAL** from the Circuit Court of Coles county; the Hon. **FRANK K. DUNN**, Judge, presiding.

**NEAL & WILEY**, for appellant.

**JAMES W. & EDWARD C. CRAIG**, (HENLEY & HENLEY, of counsel,) for appellee.

**Mr. JUSTICE CARTER** delivered the opinion of the court:

This was an action of ejectment brought by the appellant, against the appellee, to recover a tract of land in Coles county. There was a judgment for the defendant and the plaintiff appealed.

In the lifetime of Harvey B. Worley, who was the owner of the land, Charity Wilson obtained a judgment against him for \$1500. After his death Amanda T. Worley was his administratrix and settled his estate and was discharged. After her discharge Charity Wilson gave to her, as such administratrix, in pursuance of section 39 of the act relating to judgments, (Hurd's Stat. 1897, p. 983,) written notice of the existence of the judgment against

her intestate, in order that she might have execution issued upon the judgment. After the expiration of the three months as provided by the statute, execution was issued upon the judgment and the land in question was levied upon and sold to the plaintiff. Afterward, learning that the estate had been settled and that the administratrix had been discharged before the notice was given, Charity Wilson by her motion caused the sale to be set aside by the court and thereupon undertook to give notice of her said judgment to the heirs-at-law of the said Harvey B. Worley, as provided in said section 39 in cases where there is no executor or administrator of the estate. Said section provides for the sale of the real estate of the judgment debtor without reviving the judgment, upon execution to be issued after the expiration of twelve months after his death, but that no sale shall be made on such execution "until the person in whose favor the judgment or decree is sought to be enforced shall give to the executor or administrator, or, if there be neither, the heirs of the deceased, at least three months' notice of the existence of such judgment or decree before issuing execution or proceeding to sell, which notice shall be in writing when the parties required to be notified reside or may be found within the State and their place of residence known, otherwise publication notice shall be given in the manner directed for chancery proceedings in sections 12 and 13 of an act entitled 'An act to regulate the practice in courts of chancery,' approved March 15, 1872."

The affidavit of the plaintiff was filed with the clerk of the court, stating the names and residence of the heirs of Harvey B. Worley, in attempted compliance with section 12 of chapter 22 of the Revised Statutes, relating to notice in chancery practice. Notice was then given to the non-resident heirs by publication and mail, which appellee contends was not given as the statute requires; but as we have reached the conclusion that the notice

to one of the resident heirs was insufficient we need not consider whether the notice to the others was sufficient or not. Upon the second execution sale appellant purchased and obtained a sheriff's deed.

The evidence shows that Edna Curry was one of the heirs and that she resided at Ashgrove, in this State, and that the plaintiff went to her place of residence and delivered the written notice, or a copy thereof, to "a member of her family." The evidence shows nothing more than this as to notice to her. Under the statute no execution could issue until written notice had been given to her, as she resided in this State. The service of this notice should have been personal. (*Chicago and Alton Railroad Co. v. Smith*, 78 Ill. 96.) The statute makes no provision for the service of such a notice by delivering it to a third person, though a member of her family, nor for any form of substituted service, and no presumption arises that she received it. Whether, in the absence of evidence to the contrary, such a presumption would arise as to other heirs, residents of this State, to whom written notices were sent, in letters properly stamped and addressed, through the mails, it is not necessary to consider, for the reason that the failure to give the required notice to one of the heirs was a failure to comply with a statutory condition necessary to the validity of the execution and sale. It is only by statute that an execution can issue in such a case, and it can issue and have force only upon compliance with the statute. The plaintiff could recover only upon the strength of his own title, and the burden was on him to prove that the notice was given as required by the statute. In this he failed.

The judgment of the circuit court must be affirmed.

*Judgment affirmed.*

WILLIAM A. GRAY

v.

ELIOT CALLENDER.

181 173  
111a 418*Opinion filed October 13, 1899.*

1. PROPOSITIONS OF LAW—*a proposition of law should not ignore the evidence.* A proposition asked to be held as the law of the case is properly refused when it ignores a part of the evidence.

2. SAME—*a proposition of law not applicable to the facts found by the court is properly refused.* A proposition requested to be held as law in the decision of the case is properly refused when not applicable to the facts as found by the court.

3. ASSUMPSIT—*when action lies for money had and received.* An action for money had and received lies in favor of one who paid money against another who received it, with the mutual understanding that it be applied to a particular purpose, where the person receiving it failed to apply it to the agreed purpose but paid it to a third person who had no right to it.

*Gray v. Callender*, 81 Ill. App. 547, reversed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. T. M. SHAW, Judge, presiding.

Gray, the appellant, purchased real estate in Peoria of one VanMarter, for which he gave his five promissory notes, of \$4000 each, secured by mortgage on said real estate. Callender, the appellee, who was a banker and real estate agent, was VanMarter's agent in the transaction, and held the notes and mortgage, and collected from Gray and credited on the notes the interest for the first year. Callender, at VanMarter's request, had endeavored to sell or to borrow money on the notes but had not yet done so, when early in January, 1894, VanMarter came to Peoria and took the notes into his own hands but left the mortgage and insurance policies in the hands of Callender. Soon after, in the same month, VanMarter wrote Callender from New York to make no further effort to dispose of the notes, saying that he had arranged to put

them up as collateral. Afterward, in November, 1894, Callender sent two notices to Gray, the first to the effect that the interest (\$1200) was due on the notes, and the second that one of the notes and the interest would be due November 16. Gray responded to the notices and went to Callender's office several times, taking with him the first time a check for \$5200 with which to take up the note then due and to pay the interest, but as Callender did not have the notes he took the check away and returned a few days afterward with a check payable to Callender for the \$1200, the amount of the interest only. Callender took the check and gave Gray VanMarter's receipt, signed by him (Callender) as agent, for the same, in full for the interest then due on the notes. Callender reserved \$15 which VanMarter owed him for insurance, and, in compliance with a previous request by letter from VanMarter, forwarded the balance, \$1185, to a bank at Tacoma, Washington, to be placed to VanMarter's credit, and it was so credited by the bank. At this time, however, VanMarter was not the holder of the notes, but had several months before assigned and delivered the notes to one Story, and had executed to Story an assignment of them and of the mortgage, which assignment Story had placed on record in the recorder's office of Peoria county, but neither Gray nor Callender knew of such a record. Story assigned the notes to his son, who afterward foreclosed the mortgage. Gray, in defense to that suit, set up the payment, as aforesaid, of the \$1200 interest, but was defeated, and in the decree the full amount, principal and interest, was allowed against him. He then brought this suit against Callender to recover the \$1200 which he had paid Callender as interest on the notes.

When Gray paid the \$1200 to Callender he knew Callender did not have the notes but had delivered them to VanMarter, and the evidence tended to prove that he had the same information that Callender had that VanMarter had arranged to put them up as collateral security. It

further tended to prove that after Gray first called on Callender with his \$5200 check with which to pay the interest and to take up the note then due, he concluded to obtain an extension of that note from VanMarter if he could do so, and then brought his check for \$1200 and requested Callender to send it to VanMarter in payment of the interest, and to request an extension of the note.

The case was tried by the court without a jury and judgment rendered against the plaintiff for costs. The Appellate Court affirmed the judgment, and Gray then took his further appeal.

DAN R. SHEEN; for appellant.

STEVENS, HORTON & ABBOTT, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

The trial court refused three propositions asked by the plaintiff to be held as law in the decision of the case, and in so deciding appellant alleges there was error. The first ignored the evidence that Callender sent the money to VanMarter at the request of Gray, and was therefore properly refused. The other two were abstract propositions of law, and were prefaced thus: "The court holds the law of this case to be," etc. Manifestly the court could not hold the proposition as *the law of the case* unless the facts as found made the proposition applicable, and as the court found the facts the second proposition was not applicable and therefore could not be "the law of the case." The third proposition was, we think, applicable to the \$15 which Gray retained to pay an insurance debt which VanMarter owed him. The substance of Callender's contention, and of the holdings of the courts below, is, that he was not liable to Gray for the \$1200 which he received from Gray with which to pay the interest on the notes, for the reason that Gray knew he did not then have the notes but that VanMarter had put them up as collateral, and that Gray requested

him, Callender, to send the money to VanMarter and to request an extension of the note then due. We must assume such to be the facts, and that Gray was willing to trust to VanMarter to see to the application of the money forwarded to him by Callender. That being so, Callender would not be liable to Gray for the failure of VanMarter to make the application. Callender complied with Gray's request to the extent of sending to VanMarter \$1185, but paid to himself the remaining \$15 to discharge VanMarter's debt to him. The retention of the \$15 was clearly a misapplication of that much of the money which Gray placed in his hands to be forwarded to VanMarter. Gray's purpose, as Callender knew, was to have the money applied to pay the interest he owed on the notes, and he was willing to trust VanMarter to so apply it whether he or some one else then held the notes, and Callender had no right or authority to retain or apply otherwise any part of it and was clearly liable to Gray for the amount retained. Suppose VanMarter had owed Callender the whole amount of \$1200, and Callender, instead of remitting it to VanMarter to pay the interest, as understood between Gray and Callender, had applied it in payment of VanMarter's debt to him, could it be doubted that Callender would have been liable to Gray for the whole amount so retained or misappropriated? Callender's right to appropriate the money depended on its ownership by VanMarter, and as it turned out that VanMarter did not own it and had no right to it, Callender is liable to Gray for the amount retained by him. It is immaterial that it might as well have been lost to Gray had Callender remitted it all; as he did not apply the \$15 as directed, and it was lost to Gray, he is liable for it. To that extent the third proposition was applicable and should have been held. It contained the correct proposition that where one person pays money to another with the mutual understanding that it is to be applied to a particular purpose, and the person so re-

ceiving the money fails to apply it to that purpose but pays it over to a third person who has no right to it, then an action for money had and received lies in favor of the party so paying the money, against the one receiving it from him. *Drovers' Nat. Bank v. O'Hare*, 119 Ill. 646.

For the error indicated the judgments of the Appellate and circuit courts are both reversed and the cause remanded.

*Reversed and remanded.*

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THE PEOPLE *ex rel.* George M. Caldwell *et al.*

*v.*

THE COMMISSIONERS OF WILD CAT DRAINAGE DISTRICT.

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d91a 245

*Opinion filed October 13, 1899.*

1. **PLEADING**—*when plea in quo warranto is cured by verdict.* In quo warranto against drainage commissioners to test their right to exercise jurisdiction over the relators' lands and assess the taxes complained of, a plea setting up a resolution of the board, reciting that the relators had connected their ditches with those of the district and had thus voluntarily applied, under the statute, to be included in it, although defective for failure to specifically show title in the district aside from its own findings and conclusions, is cured by verdict for defendants upon an issue joined on a replication denying that the connection was made.

2. **DRAINAGE**—*owner of dominant heritage cannot connect with drainage ditch without conforming to the statute.* The right of the owner of a dominant heritage to collect into ditches the waters naturally flowing from his lands over a servient heritage, does not entitle him to discharge them into the artificial ditches of a drainage district located thereon without subjecting himself to the conditions of section 42 of the Farm Drainage act, (Laws of 1885, p. 91,) providing that such connection shall be deemed a voluntary application to be included in the district and that the lands drained shall be subject to taxation.

3. **SAME**—*one connecting with drainage ditch is estopped to deny benefits.* One who voluntarily connects his ditches with the drains dug by the commissioners of a drainage district and drains his lands through them, thereby subjecting his premises to taxation under the provisions of section 42 of the Farm Drainage act, cannot be heard to say that his lands are not benefited.

WRIT OF ERROR to the Circuit Court of Champaign county; the Hon. FRANCIS M. WRIGHT, Judge, presiding.

WHITE & DOBBINS, and A. J. MILLER, for plaintiffs in error.

J. L. RAY, for defendants in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

The State's attorney of Champaign county, in the name of the People, on the relation of certain land owners feeling themselves aggrieved, filed an information in the nature of a *quo warranto* against the commissioners of the Wild Cat drainage district, and alleged that said commissioners, without warrant of law, did usurp and exercise jurisdiction over certain lands belonging to the relators, and did pretend to annex said lands to said district and to levy certain special assessments thereon for drainage purposes, and asked that said commissioners be required to show by what warrant or authority they exercised the acts complained of.

Section 42 of the Farm Drainage act provides, among other things, that the owners of lands outside the district may connect with the ditches of the district already made by the payment of such an amount as they would have been assessed if originally included in the district, and if they shall so connect they shall be deemed to have voluntarily applied to be included in the district, and their lands benefited by such drainage shall be treated, classified and taxed like other lands within the district.

By their plea to the information defendants alleged that the district was a corporate body duly organized for drainage purposes in Champaign county, and that the commissioners had, before the filing of the information, at a regular meeting, adopted a certain order and resolution reciting and finding that the relators and others had connected the ditches on said lands with the ditches of the district and thereby drained their said lands into

and through the ditches of said district; and had thereby voluntarily applied to have their lands included in said district; and the order also declared that said lands should be and were so included, attached to and made a part of the district and assessed and taxed accordingly. The court overruled a demurrer to this plea, and the plaintiffs filed two replications, by one of which the alleged connection was denied, and by the other it was alleged that the relators' lands were not benefited. Issues were made, and the court submitted to a jury for trial the issue made by the first replication, whether or not the relators had connected their drains with the ditches of the district, but refused to submit the issue made on the second replication, that said lands were not benefited. The jury found that all the relators, except two mentioned, had so connected their drains, and judgment of ouster was rendered against the district as to the lands of the two relators not so connected, and for their costs, and in favor of the district as to the rest, and for costs. By this writ of error the land owners feeling themselves aggrieved by the judgment ask its reversal.

It is urged that it was error to overrule the demurrer to defendants' plea, and that this error was not cured by pleading over or by the verdict. The point made is, that the defendants were bound to justify,—that is, were bound to show by what warrant or authority they exercised their corporate functions over the lands in question and performed the acts and assessed the taxes complained of, and that the burden of proof was on them at the outset, and that their action in adopting the order and resolution set up in their plea, without any positive allegation that the relators had so connected their lands, was insufficient. In support of this view plaintiffs in error cite *People ex rel. v. City of Peoria*, 166 Ill. 517, where, among other things, it was said that in justifying it was incumbent on the corporation to show its title specifically, and that it could not do this by showing only its own find-

ings and conclusions. Such is the rule in cases of this character. It is clear, however, that the defect in the plea was cured by pleading over, or, certainly, by the verdict. In their replication the relators replied that they did not connect their ditches, etc., as alleged in said resolution and charged in said plea. Issue was joined by *similiter*, and upon the trial the defendants assumed the burden of proof to prove affirmatively, in addition to the making of the alleged order and resolution, that the relators had in fact made the connection recited and alleged in the resolution, and the court instructed the jury that the burden of making such proof was on the defendants. The question is not one of the statement of a defective cause of action or defense, as supposed by counsel, but a defective statement of a good cause of action or defense, and the defect was cured by the verdict.

It is next urged that the evidence does not support the verdict and judgment. We have carefully read and considered the evidence and are of the opinion that this point is not well taken. The question of fact was one for the jury, and we are unable to see that there was such a lack or insufficiency of evidence, or preponderance the other way, as to justify us in setting such finding aside. The section of the statute referred to has been considered by this court in numerous cases of this character, and it has been held that while the owner of the dominant heritage has the right to collect the waters naturally flowing from his lands over the servient heritage into ditches and drains and thus to discharge them, yet when he connects his ditches with the ditches dug by the district the statute takes effect, and he must be held to have voluntarily applied to have his lands included within the district. The mere fact that these relators had the legal right to have the waters from their lands flow off over the lands below them lying within the drainage district gave them no right to connect their drains with the artificial drains of the district without subject-

ing themselves to the conditions imposed by the statute. (*People ex rel. v. Drainage Comrs.* 143 Ill. 417; *Comrs. of Drainage District v. People ex rel.* 138 id. 87; *People ex rel. v. Drainage District*, 155 id. 45; *People v. Jones*, 137 id. 35.) The jury have found that they did so connect, and it is immaterial that, as owners of the dominant heritage, they were entitled to discharge the waters from their lands upon the lands in the district below them. They had no legal right by artificial means to turn such waters into the ditches dug by the district without assuming the burdens imposed by the statute.

It is next said that the court erred in refusing to submit to the jury the question whether or not said lands were benefited by such drainage through the ditches of the district. If the relators voluntarily drained their lands through the ditches dug by the authorities of the drainage district by connecting with them, and thus applied to have them annexed to the district, they ought not to be heard to say, in a proceeding of this character, that such lands were not benefited thereby. Such a connection and such an application to have the lands annexed must be treated as an admission they are benefited. As to certain lands of some of the relators it was found the drainage as to them was not so connected, and that they were not, of course, benefited by the drains of the district, and they were not included.

We are of the opinion that the circuit court decided correctly in not submitting to the jury the issue made by the second replication, as it was an immaterial one.

Complaint is made of the decisions of the court in giving instructions asked by the defendants and in modifying instructions asked by the plaintiffs, but we regard these rulings of the court as substantially free from error. The criticisms made are numerous, and we regard it unnecessary to review them here.

The judgment of the circuit court is affirmed.

*Judgment affirmed.*

CHARLES F. ROBISON

*v.*

WILLIAM BOTKIN *et al.*

*Opinion filed October 13, 1899.*

1. **WILLS**—*when testamentary clauses are not in conflict.* A testamentary clause that the testator's property be equally divided among his children is not in conflict with a subsequent clause directing the executors to sell the lands in case the heirs (meaning his children) cannot agree upon a division of them.

2. **LEVY**—*when undivided interest of child is not subject to levy.* Under a will devising the testator's property equally to his children and directing a sale of the lands in case they cannot agree upon a division, the latter do not, in the absence of an agreement or election to divide the land, take such a title thereto as is subject to levy and sale, as there is by the will an equitable conversion of the land into money.\*

APPEAL from the Circuit Court of Fulton county; the Hon. JOHN A. GRAY, Judge, presiding.

In 1883 Levi S. Botkin, owning in fee the east half of the north-east quarter of section 2, township 7, north, and the west half of the south-east quarter of section 35, township 8, north, all in range 1, east of the fourth principal meridian, in Fulton county, died leaving his last will, which will, after giving his wife, Frances M. Botkin, a life estate in all of his property, subject, however, to the payment of his debts, contained, so far as pertinent to this case, the following:

*"Second—After the death of my wife I desire that my son Jeremiah be paid \$800 as a compensation for his many services and care rendered his parents, and that he shall have the privilege of taking at the appraisement the S.  $\frac{1}{2}$  of W.  $\frac{1}{2}$  S. E. Sec. 35, 8 N. 1 E., or the whole of the eighty if he may see fit and proper; and in case he*

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\*The question what expectant and contingent interests in real property are subject to attachment or levy on execution is treated in a note to *Young v. Young*, (Va.) 23 L. R. A. 642.

takes the S.  $\frac{1}{4}$  or the whole of the W.  $\frac{1}{4}$  S. E. Sec. 35, 8 N. 1 E., to have a reasonable time to pay the same.

*Third*—The remainder of my property, both real and personal, to be equally divided amongst my beloved children, namely, Elizabeth, William, Ira, Jeremiah and Charles, deducting, however, from the share of either any obligation or indebtedness they may owe the estate.

*Fourth*—In case the heirs can agree to divide the real estate, I desire that they do so. If this cannot be done, it is my desire and wish that the executors sell the lands."

Ira Botkin, one of his children mentioned in the third clause, became indebted to the First Bank of Macksville, Kansas, and after the death of the testator the bank, under judgment obtained in the Fulton circuit court, caused the interest of said Ira in said lands to be levied upon and sold, and obtained a sheriff's deed therefor. Afterward, the receiver of the bank, under an order of the court in Kansas, sold its interest in the land so acquired to Charles F. Robison, the appellant, and, as alleged in the bill, conveyed the same to him by deed. Upon the death of the widow, Frances M. Botkin, in 1898, the appellant filed his bill for a partition of said lands. The court sustained a demurrer filed by some of the defendants and dismissed the bill, and the complainant has brought the case here, on appeal, for review.

**M. T. ROBISON, and J. A. MCKENZIE, for appellant.**

**LUCIEN GRAY, and W. SCOTT EDWARDS, for appellees.**

**Mr. JUSTICE CARTER** delivered the opinion of the court:

In sustaining the demurrer and dismissing appellant's bill for partition we are of the opinion the learned chancellor of the circuit court decided correctly. We deem it unnecessary to consider the defects in the bill, other than the fatal one that it showed no title in the complainant.

By the terms of the will, the widow having died, all of the real estate which Jeremiah Botkin would not ac-

cept under the second clause of the will must be sold by the executor, unless the beneficiaries should, by agreement, divide it among themselves, and the proceeds of such sale must be distributed equally among the testator's children named in the second clause, "deducting" (in the language of the will) "from the share of either any obligation or indebtedness they may owe the estate." Such was evidently the intention of the testator, as appears from a consideration of the entire will and all of its parts. The expression in the third clause, of his desire that the "heirs" (meaning his children) divide the land among themselves if they can do so, confers on them no right or power which they would not have had without it, for it is well settled that, even where by a will there is an equitable conversion of real into personal property by a direction contained in the will to sell and distribute the proceeds, the distributees, if they all agree, may elect to take the land and dispense with the sale. (*Baker v. Copenbarger*, 15 Ill. 103; *Ebey v. Adams*, 135 id. 80; *Matter of Corrington*, 124 id. 363.) And this will merely follows the law, that all must so agree or elect to take the land else it must be sold as directed, for each has the right to have the will carried into effect and to have the whole of the land sold, and not some undivided part of it. (Ibid; 3 Pomeroy's Eq. Jur. 143.) No such agreement or election to re-convert, or to take and divide the land, having been made, the duty devolves on the executor to sell it and distribute the proceeds. This duty is not discretionary, but is by the will expressly enjoined. There is, therefore, by the will an equitable conversion of real into personal property, and Ira Botkin took no title to the land which was the subject of levy and sale; and, as said in the cases above cited, it is immaterial whether the title descended to the heirs-at-law or passed by the will to a trustee, for, in any case, it is held in trust for the purposes of the will. As said in *Baker v. Copenbarger*, 15 Ill. 103, each of the beneficiaries has the right to insist

that the land shall be sold, unencumbered and unembarrassed by any act done or suffered by any of the others.

It is contended, however, that by the third clause of the will the land is in terms devised to Ira Botkin and the other four children of the testator therein named, and that that clause should prevail over the subsequent one in conflict with it. It is a cardinal rule that the entire will should be construed together and be made to harmonize and effect be given to every part, if possible, and that the intention of the testator as expressed in the will should be ascertained and carried into effect. We find no necessary conflict between the two clauses. It is evident from the third clause that the testator intended that the indebtedness of any one of his children to the estate should be deducted from his share of the estate, and that they should thus be made equal; and from both the clauses together, that the division and distribution should be made in personal property altogether, unless they agreed among themselves that as to the land they would take it as land. It may be remarked, also, that no such division of land could be made without the previous election of Jeremiah Botkin to take or not to take the land mentioned in the second clause of the will. The bill shows nothing on this subject.

As indicated, we are of the opinion that as to all the land mentioned in the will, except that which may be taken by Jeremiah Botkin under the second clause of the will, there was by the will an equitable conversion into money, and that the First Bank of Macksville took no title by its purchase and deed under the execution sale against Ira Botkin. It follows, of course, that the deed of the receiver of the bank conveyed no title to appellant.

The decree of the circuit court sustaining the demurrer and dismissing the bill is correct, and it will be affirmed.

*Decree affirmed.*

## MARSHALL FIELD

v.

## THE VILLAGE OF WESTERN SPRINGS.

*Opinion filed October 16, 1899.*

181	186
e195	25
181	186
e202	*538
181	186
204	*466
181	186
211	*211
181	186
115a	*294
e115a	*295

1. **INJUNCTION**—*if bill is without equity court may dismiss without further pleadings.* In a suit for an injunction alone, which, on hearing of a motion therefor, is refused, the defendant may properly be denied leave to answer, and the bill, if without equity, may be dismissed.

2. **SAME**—*when sidewalk ordinance is not so unreasonable as to be void.* An ordinance providing for the construction of a sidewalk by special taxation is not so unreasonable as to warrant relief by injunction, where the averments in the bill disclose that a walk would be of convenience to the public and that no sufficient walk exists.

3. **EQUITY**—*equity will not relieve against special tax ordinance on the ground of its unreasonableness.* Equity will not relieve against an ordinance for a local improvement on the ground that it is unreasonable, oppressive and unjust, as there is an adequate remedy at law by objection on application to confirm the special tax levied to pay for the improvement.

**APPEAL** from the Circuit Court of Cook county; the Hon. ABNER SMITH, Judge, presiding.

This is a suit for an injunction, filed July 13, 1898, by complainant, a tax-payer and owner of real estate in the village of Western Springs, Cook county, Illinois, to restrain said village from carrying out the provisions of a certain ordinance passed by it on May 24, 1898, for the construction of a cement sidewalk in front of certain blocks situated in said village, upon the ground that the ordinance was unreasonable and oppressive, and therefore void. The ordinance in question was based upon the Sidewalk act of April 15, 1875.

The village of Western Springs filed a general demurrer to complainant's original bill, which, upon argument, was sustained by the circuit court. Thereupon the complainant, by leave of court, filed instantaneously his amended bill of complaint and moved thereon for an injunction as

originally prayed. The bill alleges that complainant is, and has been for many years past, a resident of Chicago, Cook county, Illinois; that he is interested in the premises described in the ordinance above referred to, together with adjacent premises occupying considerably more than one-half a section of land, (the whole being now known as Howard Butcher's subdivision,) as the owner of certain mortgages thereon now in process of foreclosure in the circuit court of Cook county, Illinois, and also as a tax-payer in said village of Western Springs; that owing to the large number of parties (considerably over two hundred) required to be made defendants in said foreclosure proceedings, the vigorous defenses made by them, the large amount of money due complainant (being upwards of \$300,000) on account of principal and interest and taxes and assessments due from the mortgagors and secured by said premises, it is probable that said foreclosure proceedings will be carried through the Appellate and Supreme Courts of the State, and that title to said premises cannot be made marketable for many years to come; that the amount secured by said premises exceeds the market value of the same, and that complainant will probably be obliged to bid in and hold the premises upon the sale thereof for his protection, and is therefore the prospective owner of the fee simple title absolute therein; that on May 24, 1898, the village of Western Springs passed the ordinance above referred to, which is set out in full in the record; that the streets referred to in said ordinance and shown upon the plat set out in the abstract as intersecting said Howard Butcher subdivision (except Hillgrove avenue, which is the same street as that referred to in the ordinance as Chicago street,) exist in name only, and have never, in fact, been laid out upon said premises; that Chicago street is an unpaved, uncurbed, ungraded and but little-used dirt roadway, largely overgrown with grass and weeds; that none of said blocks 28 to 31, inclusive, and 36 to 39, inclusive, re-

ferred to in said ordinance, have ever been subdivided into lots, nor has any building or other improvement ever been erected thereon or upon any of the blocks in said Howard Butcher subdivision; that, on the contrary, said premises are now, and for several years last past have been, used exclusively for the raising of hay; that owing to the foreclosure proceedings pending and above referred to it will be impossible to make title to the said lots marketable for many years to come; that the cement sidewalk called for by said ordinance, if laid in front of said premises, will be seriously injured, if not entirely ruined, whenever dwellings or other improvements are laid along the line of the said walk or whenever Chicago street is improved, both through the usage to which said sidewalk will be subjected by teams and workmen in the course of such construction and improvements, and on account of the necessary laying of house drains, water and other connections between said dwellings and said Chicago street; that the south line of said Chicago street, throughout its entire length, borders on the right of way of the Chicago, Burlington and Quincy Railroad Company, and that in consequence no residences or other improvements now exist or can hereafter exist along the south line of said Chicago street; that in consequence of the above facts no benefit can accrue from the construction of said sidewalk to the premises touching thereon and described in said ordinance; that the village of Western Springs adopted the method in said ordinance providing for the construction of the said sidewalks, viz., by special taxation, under the Sidewalk act of 1875, upon the blocks of land touching thereon, for the express purpose of preventing complainant from raising the question of benefits accruing to the said abutting land from the construction of said walk; that said village had theretofore, whenever attempting to secure the construction of improvements of this nature, provided for the payment of the same by special assessment upon the premises spe-

cially benefited thereby, wherein said question of benefits might be lawfully raised; that with the exception of two or three short pieces of cement sidewalk in front of premises improved by residences, and so laid privately and voluntarily by the respective owners of said premises, there is not in the whole village of Western Springs another sidewalk similar in its composition or approaching in cost the sidewalk called for by the ordinance in question; that the sidewalk so called for is the most expensive kind of sidewalk known, is one-half mile in length, and that its construction as provided for in said ordinance would cost complainant in the neighborhood of \$2000; that fully ninety per cent of the sidewalks now in use, and which have been in use for many years past in said village, are constructed of crushed limestone, and that the cost of construction of such a crushed limestone walk or of a suitable board sidewalk in front of the said premises, which would be in all respects safe and sufficient for public use and travel, would be little more than one-half the cost per lineal foot of the sidewalk called for by said ordinance; that there was laid several years ago in front of blocks 36 and 37 referred to, and now exists in good condition and in all respects safe and sufficient for public use and travel, a crushed limestone walk similar in all respects to the other sidewalks in said village of Western Springs; that the only reason or excuse suggested by said village of Western Springs for the construction of a sidewalk in the ordinance referred to, is that it would be convenient and useful for certain children residing in the village of Western Springs who attend a high school located in said village of LaGrange, and complainant shows and charges in this connection that the number of children so attending said high school is small,—not above ten. The bill further charges that a special assessment for the purpose of the construction of an electric light plant in the said village was provided for by ordinance in June, 1897, and that appellant resisted

the confirmation of the same, and on the overruling of his objection he prosecuted an appeal to this court, and charges that the sidewalk ordinance which is sought to be enjoined was passed for the purpose of punishing the complainant for his resistance to the electric light assessment, and that he has not constructed the sidewalk for that reason, and that the sidewalk ordinance is grossly unreasonable, unjust, unfair and oppressive, and prays an injunction. The ordinance is made an exhibit.

On the filing of said amended bill the court held there was no equity therein and denied the motion for an injunction, whereupon counsel for the defendant moved for leave to file an answer to the bill, which latter motion was overruled and the defendant excepted, and the court ordered the amended bill to be dismissed for want of equity and at the cost of complainant, to which the complainant excepted and prosecutes this appeal.

**WILLIAMS, HOLT & WHEELER**, for appellant.

**FREDERICK A. WILLOUGHBY**, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

It has been held by this court that where a bill for injunction, only, is before the court, and a temporary injunction has been granted, a motion to dissolve the injunction for want of equity has the same effect as a demurrer to the bill, and the court, on sustaining the motion to dissolve the injunction, may properly dismiss the bill, and is not required to retain the same for hearing of pleadings and proofs. (*Titus v. Mabee*, 25 Ill. 257; *Weaver v. Poyer*, 70 id. 567; *Prout v. Lomer*, 79 id. 381; *Live Stock Commission Co. v. Live Stock Exchange*, 143 id. 210.) On principle, the same rule would prevail where a bill is filed for injunction only, which, on hearing, is refused. The bill may, in such case, be dismissed for want of equity for the same reason as in a case where a preliminary injunction has been granted

and a motion has been entered to dissolve the same. In this case the bill is for injunction only, and on motion for an injunction, which is refused by the chancellor because of the want of equity in the bill, it was not error to refuse to allow the defendant to answer; nor was it error, if the bill was without equity, to dismiss the same on the refusal of the injunction.

The gist of the bill is that the ordinance is unreasonable, unjust, unfair and oppressive. The ordinance for the construction of the sidewalk by a resort to special assessment as a means of raising money to pay for the improvement, was enacted under the Sidewalk act of 1875, which has been held by this court a valid act. (*White v. People*, 94 Ill. 604.) The question of the necessity of a local improvement is by the law committed to the city council, and courts have no right to interfere to prevent such improvement except in cases where it clearly appears that such discretion has been abused. The ground on which courts interfere is that the ordinance is so unreasonable as to render it void. (*McChesney v. City of Chicago*, 171 Ill. 253; *Peyton v. Village of Morgan Park*, 172 id. 102; *Walker v. Village of Morgan Park*, 175 id. 570.) In the latter case it was said (p. 573): "From the allegations of the bill it is apparent that the real ground relied upon to defeat the ordinance providing for the construction of the sidewalk is that the locality where the sidewalk is ordered constructed is so thinly settled that there is no necessity whatever for the construction of a sidewalk; that no sidewalk was needed where it was ordered to be made. What the public necessities were was a question solely for the determination of the president and board of trustees of the village of Morgan Park, and when the incorporation clothed with power has acted in strict conformity to the statute conferring the power, as was the case here, its decision must be held final and conclusive, unless it is apparent that the action of the municipality is unreasonable, unjust and oppressive, as held in *Hawes*

v. *City of Chicago*, 158 Ill. 653. It may be that there was no pressing demand for the sidewalk in question, and that it would in the end have been better had its construction been postponed until the population of the village had increased; but that was a matter for the board of trustees to settle for themselves. \* \* \* The rule is, that it requires a clear and strong case to justify a court in annulling the action of a municipal corporation acting within the apparent scope of its authority. No such case was made by the bill here. No sidewalk had ever been laid over complainant's property, and while we do not think a great necessity existed for the improvement, still we do not regard the action of the village so unreasonable, unjust and oppressive as to call upon a court of equity to interfere." In *McChesney v. City of Chicago*, *supra*, it was claimed that appellant had a plank sidewalk in front of his lot which was up to grade and in good repair, and on objection to confirmation it was insisted the improvement was unnecessary, and it was held the objection was not sustained. Under the averments of this bill it cannot be said that it does not appear that the sidewalk in question would be of convenience to the public, nor does it appear that there is such a sidewalk and in such a condition as affords sufficient accommodation to the public who have occasion to go along the premises in which the complainant has an interest. It does appear that no sufficient sidewalk exists.

Complainant relies on the case of *Hawes v. City of Chicago*, 158 Ill. 653, as being a case identically in point with this case, where it was held that the sidewalk ordinance was unreasonable, unjust and oppressive, and therefore null and void. That case and this are entirely dissimilar. In the *Hawes* case the owner of a large tract of unimproved property, in conformity with the requirements of the city council, put down a good and sufficient plank sidewalk, which was in good condition. That walk, so constructed in conformity with the ordinance, was 1256

feet long. Five months after it had been put down, and when it was in good condition and safe and sufficient for public use, the city council passed another ordinance which required the plank walk to be torn up and a cement walk to be constructed at a cost to Hawes of \$1915. To require that he should build a board sidewalk in conformity to the city's plans, and, when this expense had been incurred and whilst that walk was in good condition, in so short a time thereafter to further require it to be torn up and another walk to be laid was an imposition on the property owner that was so unreasonable, unjust and oppressive that it was well held that an injunction could issue to restrain the enforcement of such second ordinance. But no such question is presented before the court here.

Even if it should be conceded that the ordinance was unjust and oppressive because of being unreasonable, still the appellant would have a complete remedy at law. In *Peyton v. Village of Morgan Park, supra*, which was an appeal from a judgment confirming a special assessment for curbing with concrete and paving with brick certain streets, objections were heard by the trial court to the legality of the assessment on the ground that the ordinance was unreasonable and oppressive, in view of the character of the streets, the improvements along them and the uses to which they were put, and this court, in passing upon the same on appeal, said: "The improvement was not wholly useless, and we are not prepared to say that the ordinance is void for unreasonableness or that the court erred in overruling the objections on that ground." In *McChesney v. City of Chicago, supra*, an objection was made that the improvement was unnecessary, because, it was claimed, the appellant had a sidewalk in front of his lot which was up to grade and in good repair, and this court held, on appeal, that the ground on which courts interfere is that the ordinance is unreasonable to such an extent as to render it void, and that

under the proofs in that case it could not be so held. The two cases last mentioned were cases of confirmation of the assessment, and sufficiently indicate that a complete remedy at law would exist, based on the objection that the ordinance was unreasonable, oppressive and unjust, and if such could be shown to be the case by evidence, the court could grant the relief sought in this case. Where the remedy at law is complete and adequate, equity will not assume jurisdiction.

We are of opinion that there is no error in the record, and the judgment of the circuit court of Cook county is affirmed.

*Judgment affirmed.*

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MARY A. PRESCOTT

*v.*

THE WEST CHICAGO PARK COMMISSIONERS.

*Opinion filed October 16, 1899.*

This case is controlled by the decision in *Cummings v. West Chicago Park Comrs.* (*ante*, p. 136.)

APPEAL from the County Court of Cook county; the Hon. W. T. HODSON, Judge, presiding.

W. P. QUINBY, for appellant.

FRANCIS A. RIDDLE, and H. S. MECARTNEY, for appellees.

Per CURIAM: This is an appeal from the county court of Cook county confirming a special tax levied against the property of appellant for improving Douglas Park boulevard, in the city of Chicago. The only controverted question in the case is settled by the decision in *Cummings v. West Chicago Park Comrs.* (*ante*, p. 136.)

The judgment of the county court will be affirmed.

*Judgment affirmed.*

WILLIAM LANGLOIS

v.

181 195  
115a 1 64

WILLIAM A. McCULLOM.

*Opinion filed October 16, 1899.*

1. **PLEADING**—*a general demurrer to a bill which has equity is properly overruled.* A general demurrer which fails to point out any defects in the bill is properly overruled if there is equity in the bill.

2. **SAME**—*it is not sufficient to charge fraud generally.* It is not sufficient to charge fraud generally in reference to a transaction assailed on that ground, but the complaining party must plead and prove the specific acts or facts relied on as establishing the fraud.

3. **SAME**—*when allegation of fraud in bill to remove cloud is sufficient to warrant relief.* An allegation in a bill to set aside a tax deed, that the affidavit for the deed was "defective and fraudulent," is sufficient, after the overruling of a general demurrer and the entry of a decree *pro confesso*, to warrant the setting aside of the deed, where it is found that the affidavit fraudulently stated that the premises were vacant and unoccupied.

4. **CLOUD ON TITLE**—*when a tax deed will be removed as a cloud.* A tax deed will be set aside as a cloud on the title when the affidavit on which it was issued fraudulently and falsely stated that the premises were vacant and unoccupied, thereby obviating the necessity of giving notice to the occupant.

**APPEAL** from the Circuit Court of LaSalle county; the Hon. CHARLES BLANCHARD, Judge, presiding.

**GAGE & DEMING**, for appellant.

**BUTTERS, CARR & GLEIM**, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

Appellee filed a bill on the 27th of September, 1898, alleging that he had for forty years resided in LaSalle county, and that he was in possession of the south half of the south-east quarter of the south-west quarter of section 31, township 33, north, range 5, east of the third principal meridian, and leased it to one Gillen from 1890

to 1894, and that the lessee sub-let the land for the same period to one Messenie, who retained possession during those years. The bill alleges that the complainant obtained title to the property in January, 1865, and since that date has been in the actual possession thereof, either in person or by his tenants; that for the year 1891 the property was wrongfully assessed, and that on the 15th day of June, 1892, the county treasurer sold said land under an alleged judgment of the county court and precept issued thereon and a certificate of purchase was issued, and that afterward, on May 10, 1895, on a fraudulent and defective affidavit made by the appellant, a tax deed was duly issued to him, which was duly recorded; that the appellee had tendered a much greater sum than the amount of the taxes, and offers to pay into court the sum so tendered; avers that since the sale under the tax deed he has paid all taxes; that the tax deed is a cloud on his title, and asks to have the same set aside.

The appellant filed a general demurrer to the bill, which was overruled and a rule entered against the appellant to answer. It appears that subsequently, on his failure to comply with the rule to answer, he was declared to be in default and a decree *pro confesso* was entered, which finds that "said cause having come on to be heard on the bill of complaint, taken as confessed, and the oral testimony of witnesses examined in open court, together with documentary evidence, and the court having heard argument and being fully advised, and on consideration thereof finds that all the material facts charged in the bill are true as therein stated." Then follow the specific findings of ownership of the land since January, 1865, and that during all the time since complainant was in the actual possession of the same, either in person or by tenants; that at no time has the land been vacant or unoccupied, and that all taxes have been paid; that the affidavit on which the deed was based is untrue and defective, in that "it is stated in said affidavit,

in substance, that said premises were vacant and unoccupied, and that no person or persons were in the actual occupancy thereof three months prior to the expiration of the time of redemption from said sale, when the court finds from the evidence the contrary to be true, and that said premises were then in the actual occupancy of said Constance Messenie, and that this fact could have been easily learned by said Walter Langlois upon diligent inquiry. The court further finds that the facts set forth in the said affidavit are further untrue in this: that it is stated in said affidavit that the owner of said tract of land could not be found, on diligent inquiry, within said county of LaSalle and did not reside therein within the knowledge and belief of deponent, when the court finds that said William A. McCullom was then the owner thereof, and that his deed therefor was then of record in the recorder's office in said county in book 179, at page 285, and that said McCullom then, and for many years prior thereto, lived in said county, and the greater part of the time within five miles of the property, and that his post-office was Marseilles." It is further found that the tax deed is a cloud on the title and the same is decreed to be set aside.

It is expressly found in the decree that evidence was heard in open court, both documentary evidence and the testimony of witnesses. In the record presented to this court there is contained no evidence, documentary or otherwise, as having been submitted to the court. The appellant insists that there is no allegation in the bill showing appellee could have been served with notice, and that the decree is based on a finding of facts different from the facts alleged in the bill. The averment that the deed was issued on a defective and fraudulent affidavit is found by the court to be sustained by the evidence, and the court expressly finds the affidavit is untrue and defective in stating that the premises were vacant and unoccupied, etc.

The findings in the decree are such that the relief could be granted on the averments as made in the bill. Where a transaction is sought to be assailed on the ground of fraud, it is not sufficient to charge fraud generally, but the complaining party must state in his pleadings and prove on the trial the specific acts or facts relied on as establishing fraud. *Roth v. Roth*, 104 Ill. 35.

The affidavit to be made by the purchaser or assignee of a purchaser is fixed by the statute as to what must necessarily be set forth therein, and that section of the statute provides that the person in the actual possession or occupancy shall be served with such notice of an intention to apply for a deed. The bill in this case, averring, as it does, actual occupancy and possession, either in person or by tenants, and averring the affidavit to be fraudulent and defective because it fails to show any fact with reference to possession, must be held sufficient, and the finding that the affidavit was untrue would be sufficient on which to base the relief prayed for. Inasmuch as the demurrer did not point out the alleged defects in the bill, the allegations in the bill must therefore be held sufficient, and the proof as shown by the findings sufficiently corresponds with and sustains those allegations.

It sufficiently appears there is equity in the bill, and it was not error to overrule a general demurrer to the bill. *Wescott v. Wicks*, 72 Ill. 524; *Gage v. Schmidt*, 104 id. 106.

The averments of the bill are sufficiently sustained by the decree and authorize the decree as entered, to the extent the complainant was entitled to the relief prayed.

The decree of the circuit court of LaSalle county is affirmed.

*Decree affirmed.*

## SIMON KRUSE

v.

FRANCIS J. KENNELL *et al.*

Opinion filed October 16, 1899.

181	199
99a	*178
181	199
208	*524

1. GAMING—right of third party, under section 132 of Criminal Code, to sue for treble sum lost, extends to gambling in grain. The right conferred upon any one, by section 132 of the Criminal Code, (Rev. Stat. 1874, p. 372,) to sue for and recover treble the value of money lost by betting in case the loser does not, within six months, sue for the sum lost, applies to money lost by gambling in grain options, in violation of section 130 of such code.

2. SAME—section 132 of Criminal Code construed as to who is a “winner.” A broker or commission man who receives money or property to be used in the payment of losses incurred in transactions in grain which are gambling contracts under section 130 of the Criminal Code, is a “winner,” within the meaning of section 132, and subject to the penalty imposed thereby.

3. SAME—severity of penalty for gambling furnishes no reason against enforcing the law. The severity of the penalty imposed by a statute against gambling, which authorizes a recovery by any person of treble the amount lost, furnishes no reason against its enforcement, where the language authorizing such recovery is clear.

CARTWRIGHT, C. J., dissenting.

*Kruse v. Kennett*, 69 Ill. App. 568, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

FOSTER & KRUSE, for appellant.

D. M. KIRTON, and WALTER S. HULL, for appellees.

Mr. JUSTICE BOGGS delivered the opinion of the court:

Appellant filed in the circuit court of Cook county a declaration against appellees, the first count whereof is:

“For that whereas said defendants heretofore, to-wit, on the seventh day of September, A. D. 1893, at the city of Chicago, county of Cook and State of Illinois, were en-

gaged, under the firm name of Kennett, Hopkins & Co., in the business of gambling in grain and in wagering and betting on the market price of grain at a future time; and whereas, the said defendants heretofore, to-wit, on the day and year aforesaid, at the city of Chicago aforesaid, made an agreement with one J. Q. Savage that they, the said defendants, would, from time to time, as the brokers of said J. Q. Savage but in their, the defendants', own name, enter into contracts with divers persons for the purchase and sale of grain for future delivery, and that there should be no delivery of the grain so purchased or sold; and that said plaintiff further says that it was then and there further agreed and understood by and between the said defendants and the said J. Q. Savage that the said J. Q. Savage should not be called upon or required to receive, deliver or pay for any of the grain that might be so purchased or sold by the said defendants for the account of the said J. Q. Savage; that all of the contracts that might be made by the said defendants for the purchase or sale of grain, as aforesaid, should be settled before the time for delivery arrived, by the payment or receipt of the difference between the price at which the grain was or might be bought or sold and the market price of like grain for like delivery at the time of settlement, and that all such transactions and deals in grain should be settled upon differences, as indicated and determined by the fluctuation of the market; and that plaintiff says that it was then and there further agreed and understood by and between the said defendants and the said J. Q. Savage that the defendants should, from time to time, as the brokers of said J. Q. Savage but in their, the defendants', own name, make contracts to have and to give to themselves the option to sell and buy grain at a future time; and the plaintiff further says that in pursuance of the aforesaid arrangement, agreement and understanding, and as the brokers of the said J. Q. Savage, the said defendants, not regarding the statute in

such case made and provided, did heretofore, to-wit, on the seventh day of September, A. D. 1893, at Chicago, aforesaid, enter into contracts for the purchase and sale of a large amount of grain, to-wit, 1,000,000 bushels of wheat and 50,000 bushels of corn for delivery at a future time, and that before the maturity of any of said contracts all of said deals and transactions in grain were closed and settled by the payment or receipt of differences, and that no grain was delivered on said contract; and the plaintiff further says that in pursuance of the aforesaid agreement and understanding, and as brokers of the said J. Q. Savage, the said defendants, not regarding the statute in such case made and provided, did heretofore, to-wit, on the seventh day of September, A. D. 1893, at Chicago, aforesaid, enter into contracts, in their own name, to have and to give to themselves the option to sell and buy at a future time a large quantity of grain, to-wit, 100,000 bushels of wheat and 100,000 bushels of corn, and that for the purpose of reimbursing and indemnifying the said defendants against losses which they had or might sustain by reason of the deals and transactions aforesaid, the said J. Q. Savage, as J. Q. Savage, A. N. Knapp, Higbee & Savage, McIntosh & Savage, N. L. Stewart, and Savage & Forsythe, did heretofore, to-wit, on the seventh day of September, A. D. 1893, at Chicago, aforesaid, pay to the said defendants a large sum of money, to-wit, the sum of six thousand (6000) dollars, being money then and there lost and paid by the said J. Q. Savage to the said defendants at one and the same time exceeding the amount of ten dollars, and by the said defendants then and there won of and from the said J. Q. Savage by wagering and betting on an unknown and contingent event, to-wit, on the market price of grain at a future time, contrary to the form of the statute in such case made and provided; and the plaintiff says that the said J. Q. Savage did not, within six months from the time he lost and paid the said several sums of money, as

aforesaid, bring suit to recover the same or any part thereof, whereby, and by force of the statute, to-wit, section 132 of chapter 38 of the Revised Statutes of the State of Illinois, an action had accrued to the said plaintiff to have and recover of and from the said defendants, as well for the said county of Cook as for himself, the sum of eighteen thousand (18,000) dollars, being treble the amount in value of the said several sums of money lost and paid by the said J. Q. Savage to the said defendants, as aforesaid."

The declaration contained a second and third count, both in substance the same as the one set out above.

The court sustained a general demurrer to the declaration, and, as the appellant (plaintiff below) elected to abide by his pleading, dismissed the action at the cost of appellant. The judgment of the circuit court was affirmed by the Appellate Court for the First District on appeal, and the cause comes here by further appeal of the plaintiff below.

Section 132 of the Criminal Code, referred to in the declaration, is as follows: "Any person who shall at any time or sitting, by playing at cards, dice or any other game or games, or by betting on the side or hands of such as do game, or *by any wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election or unknown or contingent event whatever*, lose to any person so playing or betting any sum of money or other valuable thing, amounting in the whole to the sum of \$10, and shall pay or deliver the same or any part thereof, the person so losing and paying or delivering the same shall be at liberty to sue for and recover the money, goods or other valuable thing so lost and paid or delivered, or any part thereof, or the full value of the same, by action of debt, replevin, assumpsit or trover, or proceeding in chancery, from the winner thereof, with costs, in any court of competent jurisdiction. \* \* \* In case the person who shall lose such money or other thing, as aforesaid, shall not,

within six months, really and *bona fide* and without covin or collusion, sue and with effect prosecute for such money or other thing by him lost and paid or delivered, as aforesaid, it shall be lawful for any person to sue for and recover treble the value of the money, goods, chattels and other things, with costs of suit, by special action on the case, against such winner aforesaid, one-half to use of the county and the other to the person suing."

The section, the italicised portion omitted, was enacted in 1845. As enacted in 1845 it covered the offenses denounced as gambling by the criminal statutes then in force. Contracts of the character set out in the declaration were not then declared to be gambling contracts by the statute. In 1874 the General Assembly enacted section 130 of the Criminal Code, as follows: "Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so, in relation to any of such commodities, shall be fined not less than \$10 nor more than \$1000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." At the same time, and as a part of the same enactment, the General Assembly re-enacted section 132, and added the words appearing in italics in the copy of that section hereinbefore set out.

It is manifest the italicised words were added to the section for the purpose of extending the remedies and penalties provided by it to newly declared offenses of gambling, including gambling in grain options, and this court has distinctly ruled that the remedial parts of section 132 extend to and include contracts to sell or buy grain in violation of the terms of section 130. In *Pearce v. Foote*, 113 Ill. 228, which was an action in trover brought

under said section 132, we held that the plaintiff was entitled, under the provisions of the section, to recover the value of a note given to him by another, and which note he had transferred in settlement of "differences" in deals in grain options negotiated under contracts entered into in violation of the provisions of said section 130. In *Cothran v. Ellis*, 125 Ill. 496, the ruling in *Pearce v. Foote, supra*, was referred to as announcing the construction given the section by this court. In *Jameson v. Wallace*, 167 Ill. 388, the complainant in a bill in chancery was held entitled, by reason of the provisions of said section 132, to a decree awarding the return of certain collateral shares of stock in incorporated companies pledged by her to the defendant in the bill, her broker or commission merchant, to secure said defendant against losses incurred in a transaction in the stock of a gas company, the transaction being a gambling contract under the terms of section 130, and a decree rendered by the circuit court in favor of the complainant in the bill for the value of certain of such collaterals sold by defendant was affirmed in this court.

It is unnecessary the grounds of these decisions should be re-stated. These cases commit this court to the position the remedial portions of section 132 may be resorted to by a loser in a transaction denounced as gambling by the provisions of section 130. The action sought to be sustained in the case at bar is based upon the penal provisions of the section, and is given in express terms by the section to any one who will sue, in the event the loser does not, "within six months, really and *bona fide* and without covin or collusion, sue and with effect prosecute for such money or other thing by him lost and paid or delivered, as aforesaid,"—that is, in the event the loser does not avail himself of the remedial portions of the section.

The rule penal statutes are to be strictly construed should not be departed from, to the end that penalties shall not be inflicted except in cases clearly intended to

be included in such statutes. But it is not permissible to arbitrarily indulge the rule to such an unreasonable length that the manifest intention of the law-making power shall be defeated by mere construction. The language employed in the section prescribing the penalty and giving the right of action to recover it is clear and unambiguous, and the mere fact it imposes a severe penalty furnishes no reason to deny it full operation in the courts, nor does other sufficient reason appear for so doing.

It is forcibly and vigorously urged the "remedies" provided by section 132, by the express terms of the section, are to be enforced only against one who was "winner" in the transaction, and that the defendants (appellees) herein were but the brokers or commission merchants engaged by Savage to conduct the negotiations and make purchases and sales for him, and that while Savage may have paid money to them, (appellees,) the money so paid was for the purpose of securing them against loss upon his purchases and sales of grain, or for the purpose of paying his losses to those who did win, on the contracts made by defendants for him. That contention cannot be regarded as an open one in this court. We held in *Pearce v. Foote, supra*, and *Jameson v. Wallace, supra*, that if one acting as broker or commission man for another in the purchase of grain or stocks, under contracts which are gambling contracts under section 130, receive from such other money or property to be used, and which is used, in the payment of losses incurred in the transaction, the broker or commission man is a "winner," within the meaning of that word as employed in the statute in question. The allegations of the declaration show that the defendants were "winners" from Savage, even more clearly than did the facts developed in the cases cited show the defendants in those cases were "winners." The allegations of the declaration in substance are, that the defendants entered into an agreement with Savage that he should

make illegal contracts to buy from or sell certain quantities of grain to them at certain prices, and that they would enter into illegal contracts with other persons to buy from or sell to such other persons like quantities of grain at like prices, and that Savage should pay to the defendants all sums they should win from him on the contracts made by them with him, in order to provide a fund wherewith they could pay such amounts as should be won from them on their contracts with such other parties. The declaration alleges that Savage did make such illegal contracts with the defendants, and that he paid to them the losses on such contracts. It is clear they won such sums so paid to them by Savage, and the fact they lost the same sums to other parties does not make them any the less "winners." The declaration disclosed a good cause of action.

The judgment of the Appellate Court and that of the circuit court are reversed, and the cause is remanded to the circuit court with directions to overrule the demurrer and require the defendants to plead.

*Reversed and remanded.*

Mr. CHIEF JUSTICE CARTWRIGHT, dissenting.

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THE CATHOLIC ORDER OF FORESTERS

v.

BARBARA FITZ.

*Opinion filed October 16, 1899.*

181	206
100a	263
181	206
109a	194
181	206
113a	2560
e113a	2561

1. APPEALS AND ERRORS—*whether deceased member of benefit society was in good standing is a question of fact.* Whether a deceased member of a benefit society was in good standing is a question of fact, upon which the adjudication of the trial and Appellate Courts is conclusive in an action at law.

2. SAME—*when instruction ignoring matters of defense is not erroneous.* An instruction given for the plaintiff which ignores matters of de-

fense which there is evidence tending to prove is not erroneous, where the jury could not have been misled by the omission, and the instructions, taken as a series, fairly and impartially state the law governing the case.

3. *TRIAL—finding of jury read by court and assented to by the jury is a verdict.* If the written finding of the jury is put in proper form by the court, and is assented to by the jurors as their verdict when read aloud to them in its altered state, the finding as read constitutes their verdict.

*Catholic Order of Foresters v. Fitz*, 81 Ill. App. 389, affirmed.

**APPEAL** from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Will county; the Hon. DORRANCE DIBELL, Judge, presiding.

**E. S. CUMMINGS, and E. MEERS**, for appellant.

**COWING & YOUNG**, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

Appellee brought suit to recover upon an endowment certificate issued by appellant, of date September 3, 1891, in which appellant bound itself to pay appellee \$1000 upon satisfactory evidence of the death of Michael Fitz, her husband, and upon the surrender of the certificate, provided the same should not have been surrendered by him and another certificate issued, and upon the further condition that said Michael Fitz should comply with all rules and laws governing the order then in force or that might thereafter be enacted. The declaration in assump-  
sit contained the common counts and two special counts, in which latter the certificate is set out in substance; averring the death of Michael Fitz on April 3, 1896, and that he kept and performed the obligations by him to be kept and performed under said certificate, and that ap-  
pellee since his death has performed all that she was required to do since his death, and that she is the beneficiary, and that by reason of the death of deceased ap-

pellant is indebted to her in the sum of \$1000. Appellant pleaded the general issue, and in defense insisted that the deceased, at the time of his death, was not a member of the order in good standing. On a trial in the circuit court of Will county the jury returned a verdict for plaintiff for \$1000, on which judgment was entered. An appeal was prosecuted by defendant to the Appellate Court for the Second District, where that judgment was affirmed, and this appeal is prosecuted.

The verdict, as entered by the clerk in the record, as returned by the jury, is as follows: "We, the jury, find the issues herein joined for plaintiff, and assess her damages at the sum of \$1000, with interest at five per cent from the date of the defendant's refusal to pay said certificate, after paying all dues and assessments from November 18, 1894, to the time of his, M. Fitz's, death." By the bill of exceptions signed and certified in this case it appears that when the jury returned into court with their verdict the same was handed to the presiding judge, who read it aloud to the jury, as follows: "We, the jury, find the issues herein joined for the plaintiff, and assess her damages at the sum of \$1000," and the court thereupon inquired of the jury if they all so said and this was their verdict, to which the several members of the jury responded in the affirmative.

The record, as certified by the clerk as to the verdict returned, differs from the verdict appearing in the bill of exceptions in this cause. We held in *Hirth v. Lynch*, 96 Ill. 409: "Where the recitals of the record of proceedings as made up by the clerk and the statements of a bill of exceptions duly signed and sealed by the judge are not in harmony, we must take the real truth to be as stated by the bill of exceptions." The written finding returned into court by the jury, stating the amount found for the plaintiff and leaving additions to be made by the addition of interest, did not constitute a verdict. A verdict is not considered valid and binding until pronounced in

open court. Either party has the right to have a jury polled before the verdict is recorded, and if any juror does not assent to the verdict it is not the verdict of the jury. But where a verdict is delivered by a jury orally in court by the foreman, in the presence and hearing of the other jurors, and the verdict is in due form, it may be received as the verdict of the jury, or where, as in this case, the court puts the verdict in form and reads to the jury a verdict in proper form, to which they severally assent as being their verdict when read aloud to them, such verdict so read aloud as assented to by them constitutes the verdict of the jury. *Griffin v. Larned*, 111 Ill. 432.

The defense relied upon was, that the deceased, at the time of his death, was not a member of the order in good standing, according to the laws of the order. On this question the evidence was conflicting, and it is purely a question of fact, the adjudication of which by the trial and Appellate Courts is conclusive on this court.

Objection is made that the court erred in giving an instruction for the plaintiff which ignores matters of defense which there is evidence tending to prove. It is not necessary to state in one instruction every element of the case, both for the plaintiff and defendant. (*Judy v. Sterrett*, 153 Ill. 94.) If the instructions, taken as a series, fairly and impartially state the law governing the case, and the court can see that the jury could not be misled by the instructions, this will be sufficient, as an attempt to state the entire case, both for the plaintiff and the defendant, in one instruction is calculated to confuse the jury. It is the entire series that is to be considered in determining the question as to whether the jury could be misled thereby. (*City of Lanark v. Dougherty*, 153 Ill. 163; *Day v. Porter*, 161 id. 235; *McCommon v. McCommon*, 151 id. 428; *Wenona Coal Co. v. Holmquist*, 152 id. 581.) And whilst a single instruction may omit matters of defense in such a manner as to mislead the jury and be reversible error, yet on a careful examination of the instructions in this

case we do not find that the jury could have been misled by the series of instructions, or that there was such omission of matters of defense in any one instruction as might have misled the jury or caused confusion. We are constrained to hold that there was no error in the giving, refusing or modifying the instructions that in any manner prejudiced the defendant.

The judgment of the Appellate Court for the Second District is affirmed.

*Judgment affirmed.*

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ROBERT D. ADAMS

*v.*

JOHN S. ADAMS.

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f89a 191

*Opinion filed October 16, 1899.*

EVIDENCE—*when presumption of ownership from possession of personal property is not sustained.* Mere possession by an owner of personal property received from his mother is insufficient to establish his ownership and entitle him to the property in his own right as against her heirs-at-law, where he does not claim under a sale, gift or loan, and there is evidence tending to prove that he acted as his mother's agent.

*Adams v. Adams*, 81 Ill. App. 637, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Lee county; the Hon. JAMES S. BAUME, Judge, presiding.

MORRISON, BETHEA & DIXON, for appellant.

A. C. BARDWELL, and BARGE & BARGE, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is a petition to the June term, 1897, of the county court of Lee county, by John S. Adams, as one of the children and heirs-at-law of his mother, Amanda M. B. Adams, deceased, under sections 81 and 82 of the Admin-

istration act, to compel Robert D. Adams, his brother, to transfer to the administrator of the estate of their mother certain moneys and securities held by him, amounting to about \$10,000, alleged to have belonged to her at the time of her death.

Mrs. Adams, a widow, died intestate on the 28th day of May, 1897, leaving her sons, Waldo, Robert D. and John S., and an adopted daughter, Maud Adams, her only heirs-at-law. At the time of her death she was about seventy years old. For several years before January 1, 1895, one J. C. Ayres had conducted her business affairs, loaned money for her and collected the interest. Some time prior to November 5, 1894, she had nearly her whole personal estate invested in two mortgages, one of \$8000 and the other of about \$1600. In October of that year she informed Ayres she was tired of the irregularity of the payment of interest on the \$8000 loan, and desired to have it collected. Ayres thereupon proceeded to make the collection, and on November 5, following, the sum of \$8164.71 was collected by him. On the day the money was received by him he deposited \$6000 to her credit in the bank, and four days later \$2000 more. On January 4, 1895, he collected the other loan, amounting, with interest, to \$1758.12, which he held for the time, subject to her order. Mrs. Adams told Ayres at their meeting in October, 1894, that as her health was poor she would send her son, the appellant, to see about the collections from time to time. On December 24, 1894, Mrs. Adams gave appellant a check for \$8000, and on January 7, following, he loaned it to one Rosenthal, taking the note and mortgage in his own name, and at the same time drawing the money from the bank on the check from his mother. On January 15, 1895, Ayres gave appellant his check for \$1600, and on January 29, following, his check for \$62.25, of the funds held by him to the credit of Mrs. Adams. On the 17th of that month appellant presented the check of Mrs. Adams for \$1600 to the bank and took

a certificate of deposit for \$1500 to his own order. After her death letters of administration on her estate were taken out. The administrator filed an inventory, showing that all the property she owned at the time of her death was a lot in the city of Dixon, valued at \$500, and household furniture of the value of \$150. The object of the petition in this cause was to compel appellant to turn over the money, notes and mortgages received by him from the fund collected by Ayres, to the estate of his mother. Appellant answered the petition, denying that he had such money, notes and securities belonging to his mother at the time of her death.

The cause was heard first in the county court and afterwards in the circuit court. Upon the hearing appellant offered no evidence on behalf of himself. The finding of the circuit court was for the petitioner, ordering respondent to turn over to the administrator, among other things, a mortgage for \$8000, and the sum of \$1662.25 in cash, as the property of the deceased. This order was affirmed by the judgment of the Appellate Court for the Second District, where the cause was taken on appeal. Robert D. Adams, appellant, now appeals to this court.

As we read the evidence and the arguments of counsel in this case but a single question arises,—that is, whether the mere possession of the assets by appellant at the time of his mother's death, under the evidence in this case, is sufficient to establish his ownership and entitle him to the property in his own individual right. His sole reliance is upon the presumption of law that possession of personal property is *prima facie* evidence of ownership. There is no claim or pretense that the money did not belong to the deceased at the time it was collected by Ayres, her agent, and paid over to the bank to her credit. From the evidence there appears to be no ground for an inference that she made a gift of the money to appellant, nor does he make this claim. He does not claim that he paid his mother any consideration

for the money. By his answer he negatives the presumption that it was a loan to him. On the other hand, the evidence strongly tends to prove that he, in drawing out the money and re-loaning it, acted as the agent of his mother. From the evidence introduced the conclusion is irresistible that the courts below were abundantly justified in holding that the *prima facie* presumption of ownership was overcome, and that appellant's possession was not as owner of the property, but as agent for the owner.

We agree fully with the Appellate Court that the case of *Martin v. Martin*, 174 Ill. 371, cited and relied upon by appellant, has no bearing upon the issue here. In that case the person holding the property in dispute did not rely upon mere possession as her evidence of ownership, but upon proof which clearly showed that she was put in possession of the property as the owner, and not in any sense as an agent or in any other capacity than that of owner.

It is urged that the county court was without jurisdiction to determine this matter, because there was no evidence sufficient to establish a trust relation between appellant and his mother. On that question we see no ground for reasonable controversy. The Appellate Court held that such a relation did exist, and we are satisfied the evidence warrants the finding. The cause is one provided for by the sections of the statute before referred to, and the county court exercised its reasonable equitable jurisdiction in the matter.

From a careful consideration of the evidence and this whole record we have no hesitancy in saying the judgment of the Appellate Court is correct, and its judgment will be affirmed.

*Judgment affirmed.*

OSCAR PARK *et al.*

v.

THE MODERN WOODMEN OF AMERICA *et al.*\**Opinion filed October 16, 1899.*

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205	2494

1. STATUTES—*title of act which suggests subject matter is sufficient.* If the title of an act suggests its subject matter it sufficiently expresses parts of the act incident to and reasonably connected with the subject indicated.

2. SAME—*when act is not special legislation.* An act is not special legislation because it is directed to a particular subject, if it includes all persons that may be within the particular class to which the subject applies.

3. CONSTITUTIONAL LAW—*section 10 of act of 1897, on fraternal beneficiary societies, is not unconstitutional.* The legalizing clause of section 10 of the act on fraternal beneficiary societies, as amended in 1897, (Laws of 1897, pp. 237, 238,) which validates former action by benefit societies at meetings held outside the State, is valid, and not unconstitutional as not being sufficiently indicated in the title of the act or as being special legislation.

4. LEGISLATURE—*power of legislature to enact curative laws.* The legislature may, by curative legislation, render valid acts of a fraternal benefit society done under a supposed power and authority, where the acts are not, in and of themselves, jurisdictional with respect to the rights of person and property, and are such as might originally have been authorized by legislation.

5. BENEFIT SOCIETIES—*charter members of order of Modern Woodmen have no special rights.* The charter members of the order of Modern Woodmen have no rights which are not common to the other members of the society.

6. SAME—*directors may change location of head office when authorized by two-thirds vote.* The directors of a benefit society authorized to amend its articles of association when directed to do so by a two-thirds vote of its legislative body, may, in conformity therewith, change the location of the principal office, and such action is valid and binding on the members of the association. (*Bastian v. Modern Woodmen*, 166 Ill. 595, distinguished.)

7. SAME—*contract by promoters is not binding in absence of ratification.* A benefit society or other corporation is not liable, in the absence of ratification, upon a contract made by its promoters before its incorporation, as to the location of the principal office.

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\*With this case are considered *Bastian v. Modern Woodmen of America*, *City of Fulton v. Same*, *Bennett v. Same*, and *Baker v. Same*.

8. **SAME**—*a society cannot be required to perpetually perform contract respecting location of principal office.* Subsequent members cannot be precluded or the society be prejudiced by requiring it perpetually to perform a contract as to the location of its principal office, entered into by its promoters and ratified by the society, since compensation may be had in damages for a violation of such contract.

9. **SAME**—*head office may be moved without consent of all the members.* The principal office of a benefit society may be removed, by direction of its legislative body, for the general good of the association and for the accommodation of a great majority of its members, although all of them do not give consent thereto.

10. **ACTIONS AND DEFENSES**—*when a city cannot sue in its name for benefit of citizens.* A city is not authorized to sue in its name in behalf of its citizens to enforce a contract made by promoters, in consideration of donations by residents, that the principal place of business of a corporation should be located in such city.

11. **APPEALS AND ERRORS**—*when denial of motion for change of venue is not reviewable on appeal.* The denial of a motion for a change of venue, made at the time a temporary injunction was dissolved, is not reviewable on appeal from a decree dismissing the bill for want of equity, rendered at a subsequent hearing after the intervention of a term of court, and when the certificate of evidence does not show the facts on which the court acted.

APPEAL from the Circuit Court of Whiteside county; the Hon. HIRAM BIGELOW, Judge, presiding.

On July 2, 1897, Anthony W. Bastian and others filed their bill in the circuit court of Whiteside county, in behalf of themselves as well as all others likewise situated, alleging they were members of the Modern Woodmen of America and residents of this State, in good standing. They set out the incorporation of the society and the location of the principal office at Fulton, and alleged the adoption of by-laws of 1890 and 1895, referred to in *Bastian v. Modern Woodmen of America*, 166 Ill. 595. The bill charges that certain officers and delegates who constitute the "Head Camp" have combined and confederated to illegally remove the principal office from Fulton to Rock Island, Illinois, and charges that at the meeting of June 1, 1897, at Dubuque, Iowa, and at Madison, Wisconsin, in 1895, they assumed to transact business pertaining to the affairs of the corporation, and at such meetings pro-

vided for the adoption of acts and resolutions "affecting a removal of such chief office." The bill alleges that the head camp of the Modern Woodmen are illegally assuming to be the society, and charges that the corporation has not at any time provided for the meeting of its legislative or governing body in any other State or territory than the State of Illinois, and claims that section 10 of "An act to amend an act entitled 'An act to provide for the organization and management of fraternal beneficiary societies for the purpose of furnishing life indemnity or pecuniary benefits,'" etc., approved and in force May 27, 1897, is null and void; avers that no notice was given by any officer of the association that the alleged meeting at Dubuque would entertain an attempt to submit to the head camp a proposition to change the location of its principal office, and prays that they may be perpetually enjoined from removing the principal office, etc.

On July 27, 1897, Oscar Park and others filed another bill in the same court, alleging they were members of the corporation since the time of its incorporation, and were members of Forest Camp No. 2, one of the subordinate bodies, and alleging the incorporation and location of the principal office at Fulton. It recites the organization of the society at Lyons, Iowa, in 1883, and that it became necessary that financial and other assistance should be had by the society to secure its further existence; that the head officers proposed to the citizens of Fulton, Illinois, that if they would donate or contribute certain sums of money to obtain and pay for a charter and seal, furnish an office for their principal place of business for one year, pay the salary of the head physician for one year, and contribute to the society necessary sums of money until it should be of sufficient strength to meet its ordinary bills arising in due course of business, the head office should be located at Fulton; that this proposition was made by Joseph C. Root, head consul; that on compliance with these conditions the Modern Woodmen would

become organized under the laws of Illinois and establish its principal place of business in said city; that this proposition was agreed to by the citizens, who made certain contributions and donations. The bill then alleges the proceedings of the head camp held at Dubuque, and the legislation under which such proceedings were had, substantially as in the first bill, and prays for injunction.

On the twenty-sixth of August, 1897, the city of Fulton filed a bill alleging that it is a municipal corporation of Whiteside county, Illinois, and that the Modern Woodmen of America became incorporated as alleged in previous bills, and in its articles of association the complainant was named as the place of its principal office. The origin of the society; its existence at Lyons, Iowa; its removal to Fulton, Illinois; the proposition of Joseph C. Root, the head consul; the acceptance by citizens of Fulton thereof; the subsequent incorporation of the association under the laws of the State of Illinois; the furnishing of a building for an office, and the furnishing of necessary furniture, stationery, seal, books and papers, and the services of a head physician, are alleged, and that the head camp, at their meeting at Madison, Wisconsin, were attempting to move the head office. The bill prayed for an injunction. Subsequently, in September, 1897, Parker J. Bennett filed a bill of a similar character to that last named, alleging substantially the same facts and with a prayer for the same relief. On September 24, 1897, Leroy Baker filed his bill against certain appellees, alleging substantially the same facts alleged in the former bills.

To these several bills answers were filed by the several defendants thereto, which substantially admit the original organization at Lyons, Iowa; the organization of Forest Camp as one of the local camps; the organization of the corporation, with the adoption of by-laws; the location of its principal office at Fulton. The answers aver that the location of its principal office had been changed by lawful act of the order; deny that the head office was

established or maintained in pursuance of any contract or agreement made by the corporation; aver that if any agreement was made as charged, it was not binding or of legal force on the order to prevent it from removing its head office when the good of the order required the same, and that under the law of this State governing fraternal orders, passed since the organization of the order, any such agreement, if made, has long since become void and of no effect; that at a meeting held at Omaha, in 1892, by the head camp, the location of the principal office was legally changed from Fulton to Rock Island; that the same thing was done at a meeting held at Madison, Wisconsin, in 1895, and again at a meeting held at Dubuque, Iowa, June 1, 1897; deny that it was incorporated at the time it is claimed J. C. Root made the contract with the citizens of Fulton, and deny that he was an officer of defendant corporation; deny that such contract, if any was made, was ever ratified by the corporation; deny that any compensation to a head physician was made by complainants or any other persons mentioned, as alleged in the bill; deny there was any obligation on the part of the corporation to pay any salary to any person mentioned in the bill as head physician or to furnish an office room, or if any such compensation or contribution was made by any of the complainants or any other person, as alleged, that it was in liquidation of any obligation of the incorporation; aver that defendants have no knowledge or information concerning any alleged contributions, and neither admit nor deny the same. The answers set forth the time of incorporation, and aver that in the year 1893 the corporation was re-organized under the laws of the State of Illinois in force June 22, 1893, and aver the amendment made by the legislature on May 27, 1897, of the act of June 22, 1893; allege that on June 1, 1897, the corporation was organized and doing business under said statute in force June 22, 1893, and that on June 1, 1897, the corporation had in force a by-law as follows: "The

articles of association of this corporation may be changed at any regular session of the head camp, by resolution designating and setting forth the change sought to be made; said resolution to be adopted by at least two-thirds of the members present at the said head camp and entitled to vote thereat." The answers set forth the amendatory act of 1897, and the resolution adopted at the meeting at Dubuque, Iowa, in June, 1897; aver that afterwards, on June 3, 1897, the by-laws of the corporation were amended by naming Rock Island as the place of its principal office, and the filing of a certificate of such change of the by-laws with the proper officers within sixty days from June 5, 1897, and aver that the removal of the head office was authorized by the laws of this State and the law of the order. The answers were sworn to. Supplemental bills were filed to certain of these bills, to which answers were filed, and to the several answers replications were filed.

On August 13, 1897, an order dissolving the preliminary injunction granted on the first two bills was entered in vacation by a judge of the circuit court on the hearing on bills, answer, replication and affidavits. The injunctions in both those cases had been granted by the master in chancery. On the same day on which the order dissolving those injunctions was filed another bill for injunction was presented to the master, who ordered a temporary injunction, to which answer and replication were filed, and on motion were heard before the same circuit judge who had dissolved the preceding injunctions, and an order was entered dissolving the injunction in that case. No appeal, however, was taken from the final order in that case. The bill by the city of Fulton, filed on the twenty-sixth day of August, 1897, had been presented to the same master who granted the previous temporary injunctions, and on the coming in of the answer and affidavits a motion to dissolve the injunction was entered in vacation, and an application for a change

of venue was made by the complainants and denied on the hearing of that motion, and an order dissolving the preliminary injunction was entered on September 6, 1897. The bill by Parker J. Bennett was then filed, and a motion to dissolve the injunction granted on that bill by the master was brought before the same judge, who on the twenty-fifth of September, 1897, sustained the motion and entered an order dissolving the temporary injunction. On the twenty-fourth day of September, 1897, the master granted a temporary injunction on the bill of Leroy Baker. To this latter bill the defendants gave notice that on the thirtieth day of September they would appear before Judge Gest, at Rock Island, and move to dissolve the injunction. On the twenty-ninth day of September counsel for complainants presented a petition to Judge Gest for a change of venue, which he declined to then entertain, and on the following day, at Morrison, in Whiteside county, he entered an order dissolving the injunction.

The five bills heretofore abstracted and referred to remained on the docket for hearing, and on the twenty-first day of March, 1898, it being one of the judicial days of the January term of the circuit court of Whiteside county, an order was entered consolidating these several causes by agreement of the parties, and on hearing the bills were dismissed for want of equity and the complainants therein prayed an appeal to this court.

The complainants assign errors for dismissing the several bills, respectively; in not declaring the act of June 22, 1897, invalid; and of the circuit judge in denying the motion for a change of venue on the hearing of the motions to dissolve the temporary injunctions.

JAMES DEWITT ANDREWS, CHARLES C. McMAHON, and SAMUEL M. MCCALMONT, (WILLIAM BARGE, of counsel,) for appellants:

It is a franchise for a number of persons to be incorporated and subsist as a body politic. *Regents v. Williams*,

9 G. & J. 365; *California v. Railway Co.* 127 U. S. 41; *Pierce v. Emory*, 42 N. H. 487; *Snell v. Chicago*, 133 Ill. 413.

Corporate existence is itself a franchise belonging to the members of the corporation, and a corporation, being a franchise, may hold other franchises as rights and franchises of the corporation. *Snell v. Chicago*, 133 Ill. 413; *Pierce v. Emory*, 32 N. H. 484; *California v. Railway Co.* 127 U. S. 40.

The franchise to be a corporation of the kind and description stipulated in the charter vests in the members who become incorporated, and not in the corporation. *Regents v. Williams*, 9 G. & J. 365; *Fietsam v. Hay*, 122 Ill. 293; *Snell v. Chicago*, 133 id. 413.

The essential properties of corporate existence are quite distinct from the franchises of the corporation. *Railway Co. v. Commissioners*, 112 U. S. 609.

The act of changing the articles of association, like the act of agreeing to them, is not a corporate act of the corporation but an act of contract of the members. They may delegate such an act to officers but they are not obliged to, and, in performing such an act, the officers are agents of the members rather than corporate functionaries. *Byrne v. Electric Co.* 65 Conn. 336; *Allerton v. Railway Co.* 18 Wall. 233.

General authority to make, alter or repeal all by-laws does not authorize the delegated body to make changes in the fundamental features of the articles of association. *McNulta v. Bank*, 164 Ill. 427; *Stevens v. Davison*, 18 Gratt. 819; *Livingstone v. Lynch*, 4 Johns. Ch. 573; *Allerton v. Railway Co.* 18 Wall. 233.

So it was held in *Allerton v. Railway Co.* that a power to exercise all the corporate acts of the society did not invest the directors with power to make changes in the articles of association. And in *Venner v. Railway Co.* 28 Fed. Rep. 589, it was held that power to perform all corporate acts did not authorize fundamental changes in the plan of doing business.

In partnership and general association the majority cannot change or alter the fundamental articles of partnership against the will of the minority, however small, unless there is an express or implied provision in the articles themselves that they may do it. The same principle applies to corporations. *March v. Ballard*, 43 N. H. 515; *Livingstone v. Lynch*, 4 Johns. Ch. 573; *Byrne v. Electric Co.* 65 Conn. 336; *Zabriskie v. Railway Co.* 18 N. J. Eq. 178; *Allerton v. Railway Co.* 18 Wall. 233; *McNulta v. Bank*, 164 Ill. 427; *Eidman v. Bowman*, 58 id. 444; *Insurance Co. v. Knight*, 162 id. 470.

The consent of the members of the corporation to the making of material changes in the fundamental articles is not to be presumed, but must be proved. *March v. Ballard*, 43 N. H. 515; *Eidman v. Bowman*, 58 Ill. 444; *Allerton v. Railway Co.* 18 Wall. 233.

Inasmuch as the act of making essential changes in the articles of association or charter of the corporation is the same, in its nature, as the act of framing the articles of association in the first place,—*i. e.*, an act of contract, —such changes cannot be made without the unanimous assent of the incorporators or members. *Livingstone v. Lynch*, 4 Johns. Ch. 573; *Byrne v. Electric Co.* 65 Conn. 336; *Zabriskie v. Railway Co.* 18 N. J. Eq. 178; *Allerton v. Railway Co.* 18 Wall. 233; *Bastian v. Modern Woodmen*, 166 Ill. 395.

Acquiescence by shareholders in steps illegally taken by officers, no matter for how long a time, affords no presumption of legality. *March v. Ballard*, 43 N. H. 515.

A member is not estopped from questioning an act which affects him by having known and acted upon or in conformity with or obedience to the performance of the same act in the same way on former occasions. Such an act cannot ripen into a right. *Insurance Co. v. Knight*, 162 Ill. 470; *Railroad Co. v. Lapham*, 18 Barb. 312; *March v. Railroad Co.* 43 N. H. 515.

It is doubtful if the legislature can authorize the performance of a strictly corporate act by a corporation

beyond the State boundary in such a way as to bind members. (*Bastian v. Modern Woodmen*, 166 Ill. 595.) But it is clear that the legislature is powerless to authorize the corporation or its officers to make changes in the articles of association without the consent of the members (where no such power is reserved) without the State, not merely because of the extra-territorial feature, but because the legislature has no power to invest the officers with such a power.

A legalizing act which attempts to give force to such action taken by officers or an official body of a corporation impairs the obligation of a contract and contravenes the Federal constitution. *Regents v. Williams*, 9 G. & J. 365; *McDaniel v. Cornell*, 19 Ill. 226; *Sykes v. People*, 132 id. 32.

All members of the corporation do not necessarily stand in the same position. A member who joins after a given date cannot complain of an illegal act done before he became a member, unless it is void. But charter members may require the officers to adhere to the charter. *Marsh v. Railway Co.* 43 N. H. 525; 28 Fed. Rep. 581.

A corporation cannot change its location from any city where any of the inhabitants have "donated or in any manner contributed any money or any other valuable thing to induce such corporation" to locate. (1 Starr & Cur. Stat. chap. 32, par. 65.) This section applies to corporations not having capital stock. *Ibid.* par. 70.

The legalizing clause of section 10 of the statute of 1897 is not expressed in the title, and is void. 1 Thompson on Corp. sec. 619; *Williamson v. Keokuk*, 44 Iowa, 88; *Brieswick v. Mayor*, 51 Ga. 639.

Said section is void because it is special legislation. The same privilege might have been conferred upon all corporations by a general law.

HARVEY HURD, for appellees:

The change of the principal place of business from Fulton to Rock Island was made in accordance with the

rules of the association regularly adopted, and is therefore conclusive upon complainants. Hurd's Stat. 1892, sec. 297, p. 876; Hurd's Stat. 1897, secs. 264a, 267, p. 971; *Bastian v. Modern Woodmen*, 166 Ill. 595.

To entitle a member of an association to invoke the aid of a court of equity as against the action of the association in which he does not concur, he must show a pecuniary injury to his membership, as distinguished from its effect upon the association as a whole. *Railroad Co. v. Zimmer*, 20 Ill. 654.

The charter of a corporation formed under such a general law does not consist of the articles of association alone, but of such articles taken in connection with the law under which the organization takes place. *People v. Chicago Gas Trust*, 130 Ill. 268; *Morawetz on Corp.* sec. 318.

When one becomes a member of such an association he is presumed, as a matter of law, to know that the general law under which the association is organized may be amended by the legislature, and that the association may accept such amendment in any recognized way. *Railroad Co. v. Zimmer*, 20 Ill. 654.

An incorporation act may be amended to almost any extent not destructive of the principal purposes of the incorporation, or to divert the investment of the stockholder, or take away his property without compensation. There is a clear distinction between such an amendment, which is termed auxiliary, and one which changes the investment or takes away property rights, which is called fundamental. *Railroad Co. v. Zimmer*, 20 Ill. 654; *Sprague v. Railroad Co.* 19 id. 174; *Barrett v. Railroad Co.* 13 id. 504; *Railroad Co. v. Renshaw*, 18 Mo. 210; *Railroad Co. v. Hughes*, 22 id. 291; *Fulton County v. Railroad Co.* 21 Ill. 338; *Ross v. Railroad Co.* 77 id. 127; *Cook on Stock and Stockholders*, (3d ed.) sec. 499; *Venner v. Railroad Co.* 28 Fed. Rep. 581.

J. G. JOHNSON, and JACKSON & HURST, also for appellees.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

The purpose of this society, and its action with reference to an attempt to change the location of its principal office from the city of Fulton to the city of Rock Island, and the legislation under which such attempted change was sought to be made, are stated and set forth in *Bastian v. Modern Woodmen of America*, 166 Ill. 595, where it was held that where an incorporated benefit society has by its fundamental law fixed its principal office at a place designated in its articles of association, such principal office cannot be changed without the amendment of its fundamental law and its articles of association; that such change of its articles of association must be made in accordance with methods assented to by its members, and that statutory provisions relating thereto must necessarily be observed; that in the absence of a statute to the contrary, a corporation has no power to perform strictly corporate acts outside of the State of its creation. It was further held in that case that section 10 of the act of 1893, concerning benefit societies, was in conflict with section 18a of the act of 1887 as added by the act of 1893, and repeals the conflicting provisions of that section; that a benefit society organized in this State, which had applied for permission to continue business under the act of 1893, concerning benefit societies, was prohibited by section 10 of that act from changing the location of its principal office at a meeting held in another State. It was further held that an unauthorized and illegal removal of the principal office might be enjoined by members of the society who contributed to its support and were interested in its funds.

It is unnecessary to repeat or discuss the legislation under which this organization was acting, but that case, in its discussion of the question as to the powers of this organization under the law of this State in force prior to the time of that opinion, must be considered conclusive.

In 1897 an act was passed (Laws of 1897, p. 237,) entitled "An act to amend an act entitled 'An act to provide for the organization and management of fraternal beneficiary societies for the purpose of furnishing life indemnity or pecuniary benefits to beneficiaries of deceased members, or accident or permanent indemnity disability to members thereof, and to control such societies of this State and of other States doing business in this State, and providing and fixing the punishment for violation of the provisions thereof, and to repeal all laws now existing which conflict herewith,' by adding thereto an additional section hereby designated as section 7½, and amending sections 10 and 12 thereof." The additional section 7½ and amended section 10 are as follows:

"Sec. 7½. Any corporation, association or society organized under the provisions of this act amended by this section, may change its article of association in the manner prescribed by its own rules, but no such change shall be of legal effect until a certificate setting forth fully and definitely the changes proposed shall have been submitted to and approved by the insurance superintendent and filed in the office of the Secretary of State, and a certified copy thereof recorded in the office of the recorder of deeds in the county in which the original certificate of association was recorded. Every corporation, association or society organized, having adopted such change in its articles of association, shall comply with the provisions of this section within sixty (60) days."

"Sec. 10. Any such society organized under the laws of this State may provide for the meeting of its legislative or governing body in any other State, province or territory wherein such societies shall have subordinate bodies, and all business that has heretofore or may hereafter be transacted at such meetings shall be valid, in all respects, as if such meeting was held within this State; and where the laws of any such society provide for the election of its officers by votes to be cast in its subordi-

nate bodies, the votes so cast in its subordinate bodies in any other State, province or territory shall be valid as if cast in this State: *Provided, however,* that all meetings held within this State, in any such society organized under this law or heretofore organized, no member shall be allowed to cast more than fifteen votes by proxy on any question submitted therein."

This act was approved May 27, 1897, with an emergency clause. By this legislation any society organized under the provisions of the act was authorized to change its articles of association in the manner prescribed by its own rules, and was further empowered to provide for the meeting of its legislative or governing body in any other State or territory wherein the society should have subordinate bodies, and it declared all business that had theretofore been or might be thereafter transacted at such meetings should be valid in all respects, to the same extent as if such meetings were held within this State, and rendered valid all acts done with reference to changing the place of its principal office, and empowered the society to do what was held in *Bastian v. Modern Woodmen of America, supra*, could not be done, and legalized the action of such society in attempting to effect such removal, by which the illegality of the act, as held in that case, was obviated.

The appellants insist that the legalizing clause of section 10 of the act above is void because not expressed in the title of the amendatory act, and is special legislation. As to the first objection, it is sufficient to say that if all the provisions of the act relate to one subject, which is indicated in its title, and the parts of the act are incident to and reasonably connected with the subject indicated and are reasonably auxiliary thereto, then the act may include details of legislation with reference to that subject matter so indicated without the title being a mere index of everything contained therein. The provision of the constitution cannot be so narrowly construed as to

require the title of an act of itself to contain the entire act. It is sufficient if the title of the act suggests the subject matter; then it includes all that is reasonably auxiliary thereto. The title of this act is sufficiently full and complete to include all the subjects embraced therein, not excepting what is termed retrospective legislation.

An act which affects all corporations or persons within the particular class towards which the legislation is directed, and is general,—applicable to all belonging thereto,—is not obnoxious to an objection as being special legislation. Because it is directed to a particular subject, including all persons that may be within a particular class to which the subject applies, does not constitute the act one having reference to a special subject and does not render it special legislation. Where the legislature enacts a law with reference to a particular subject matter, and authorizes acts to be done which are not, in and of themselves, jurisdictional with reference to a person or property, it may by curative legislation approve and render valid any act done which it had power to originally authorize, and which may have been done theretofore under a supposed power and authority. If something is done or omitted constituting a defect in a proceeding, which might have been authorized or dispensed with by the legislature, a subsequent curative statute authorizing or dispensing with such act done or omitted renders the act valid. If something is done which might have been made immaterial by the legislature, that body, by a subsequent law, may cure a defect existing because of such immateriality and render the same valid. If that body has power to authorize a particular act to be done, it may by a subsequent act render valid an act so done without a power theretofore conferred. (*Town of Fox v. Town of Kendall*, 97 Ill. 72.) But this power does not extend to a jurisdictional question where the rights of persons are involved, which can only, under the constitution, be taken under due process of law. The prin-

ciple is, if a property right is asserted, whether inherent in a natural person or conferred by law upon an artificial person, the question is presented, has the legislature renounced the right to legislate further with reference to the subject matter or to subject it to further control? If so, a property right is secured either to a natural or an artificial person; but if not, a mere naked right has been granted, which is subject to governmental regulation, which may be dealt with as the public good may require, by the law-making power, in the same manner as with reference to all other rights. In *Bank of the Republic v. County of Hamilton*, 21 Ill. 53, it was said (p. 59): "If, in a law creating an artificial being, rights or powers are conferred upon it, which, by the express terms of the act or by reasonable intendment, shall not be taken away or modified by a subsequent law without the consent of the corporation, that becomes what has been termed a charter contract, and becomes a property in the hands of the corporation, and is protected by those constitutional provisions referred to; but unless there be such express provision or reasonable intendment that such right or faculty shall not be touched by subsequent legislation, it is held in the same subordination to governmental control to which the rights and faculties existing in natural persons are subject." The legislation above quoted, and the right to amend the charter of this corporation, were valid, and clearly within the power of the legislature.

Appellants contend that the change of the principal office of this corporation could not be made without the consent of its members; and further, that a contract outside the articles of association had been entered into between the promoters and the early members, fixing the location of the principal office at Fulton, and hence no change could be made of that principal office except by the unanimous consent of its members. It is further insisted, that by reason of donations made to the corporation by residents, citizens and inhabitants of Fulton, no

change could be made of the principal office from that city, even with the consent of all the members of this corporation, without the consent of the residents, citizens and inhabitants of Fulton. And it is finally urged that there is no provision in the articles of association, or of the statute under which the association was incorporated, allowing a change of the location of the principal office to be made by less than all the members, and hence it is urged that the consent of all must be had.

Prior to the act of June 22, 1893, there was no law authorizing the head camp of an incorporation existing by virtue of the laws of this State to transact business at a meeting held outside of this State. By section 10 of the act last mentioned such society organized under the laws of this State might provide for the meetings of its legislative or governing body in any other State, and all business theretofore or that might thereafter be transacted at such meetings, except so far as the same may relate to the removal of the principal place of business, shall be as valid in all respects as if such meetings were held within this State. At the meeting of the head camp of the Modern Woodmen of America held at Madison, Wisconsin, in June, 1895, certain proceedings were had and the following resolution was adopted:

*"Resolved*, That the rule of this corporation with regard to amendments to the articles of association of this corporation be and is declared to be as follows: That the board of directors of this order have power, and they are hereby required, to amend the articles of association and the fundamental law of this order in such particulars as the same may be directed to be done by vote of two-thirds of the members of the head camp, by its certificate signed by the head consul or head clerk and attested by the seal of the corporation, and that this resolution or rule take effect from and after its passage."

The exception in the act of 1893 being left out of the amendment of 1897, and the provisions of section 7½ having been incorporated in this statute by that amendment of 1897, at a meeting of the head camp held at Dubuque,

Iowa, on the second day of June, 1897, a resolution was adopted by a two-thirds vote changing the articles of association by striking out the name "Fulton" as the location of the principal office and substituting therefor "City of Rock Island," and directing the board of directors, head consul and head clerk to make, under the seal of the corporation, a certificate of such change, and have the same recorded as required by law. The certificate was so made within sixty days and approved by the insurance superintendent and filed in the office of the Secretary of State, and a copy thereof was also filed in the office of the recorder of deeds of Whiteside county. This action of the head camp at Dubuque was in accordance with the resolution adopted at Madison and a compliance with section 7 $\frac{1}{2}$  of the amendatory act of 1897, and was authorized by section 10 of the latter act.

The persons who constituted the charter members of this society have no rights which are not common to the other members of the association. This association, having its origin in a single camp composed of a small number of persons, has been extended until now there exist thousands of camps, extending over more than twenty States and including a membership of over 290,000. The manner of government of the entire body differs from the ordinary corporation for pecuniary profit. But this corporation not organized for the purpose of pecuniary profit, could not possibly carry out any legislation with reference to any change except in the manner designated in the act under which it is organized, to-wit, the act of 1893 and the amendments thereto, which have been accepted by it. Under those statutes the plan of the association as expressed in its articles and fundamental law, and acted upon from the beginning, could not and did not contemplate a meeting of its vast membership in one body. The legislative power of the association was therefore vested in the head camp,—a body composed of certain officers and representatives of the membership,

chosen by the members themselves from local camps,— and to the body as thus organized the power to exercise full authority in all matters pertaining to the weal and welfare of the association in all matters not otherwise provided for in the fundamental law is given. The delegates and certain officers assembled in a head camp in the way prescribed by the rules of the association could lawfully act on all matters delegated to that body under the articles of association and its rules, and under the statutes under which they were organized and the amendments thereto, and the action of such head camp was the action of the members of the association. The head camp might, therefore, under this amendatory legislation of 1897, and under the action taken at Madison and Dubuque, lawfully change the location of the principal office, and such action is valid and binding on the members of the association. In so doing their action is not in conflict with anything said in *Bastian v. Modern Woodmen of America, supra*.

What is here said disposes of the allegations of the bills of Anthony W. Bastian *et al. v. Modern Woodmen of America et al.*, and of the bill of Leroy Baker *v. Charles W. Hawes and Modern Woodmen of America.*

By the bills of Oscar Park *et al. v. Modern Woodmen of America et al.*, City of Fulton *v. Modern Woodmen of America*, and Parker J. Bennett *v. William A. Northcott et al.* and the Modern Woodmen of America, it is averred, in substance, that a secret fraternal society first came into existence at Lyons, Iowa, in 1883, and it is alleged that twenty-one persons, constituting the sole membership of the society of the Modern Woodmen of America, elected Joseph C. Root head consul, Lewis G. Blaine head banker and Albert Hilton head clerk, which last named officers constituted an executive committee, with power to make and execute contracts. The bills allege that a proposition was made to the citizens of Fulton, Illinois, that the Modern Woodmen of America would

become organized under the laws of the State of Illinois and establish its principal place of business at Fulton if the citizens and inhabitants would donate or contribute toward the society certain sums to pay for the obtaining of a charter in Illinois, to purchase a corporate seal, furnish an office for the principal place of business for a period of one year, pay the salary of a head physician for one year, and contribute towards the society necessary sums to keep it in running order, and would organize a local camp; that the Modern Woodmen of America would then, as soon as practicable, become incorporated under the laws of the State of Illinois, and would move its principal office from Lyons, in the State of Iowa, to Fulton, Illinois; that the inhabitants of Fulton agreed to accept said proposition, and organized Forest Camp No. 2, and paid the necessary funds for the incorporation of the society under the laws of the State, and there were paid by certain individuals certain small sums of money in carrying out the alleged contract, and paid for the head physician and for office rent for one year, with other expenses; that said society became incorporated in pursuance of said agreement, and named in the articles of association Fulton, in Whiteside county, in the State of Illinois, as its principal place of business; that said contract was reduced to writing. The proposed removal of the principal office is then alleged in these several bills.

There is no evidence in this record showing any contract reduced to writing, and its destruction, as alleged in several of these bills, by which the principal office was to be kept at Fulton, in Whiteside county, Illinois. The weight of proof tends to show that no such agreement in writing ever existed. The contract, as set out in the bills, is, in effect, an allegation that the promoters of this incorporation who had incorporated its first camp at Lyons, Iowa, proposed to move the principal office to Fulton, Illinois, and retain the principal office at that place for certain alleged considerations. The considera-

tions alleged to have been paid, so far as the allegations of these bills are concerned and so far as set forth therein, and under the proof in this record, might be disposed of by the application of the maxim *de minimis non curat lex*. With reference to those allegations, it is sufficient to say that under the averments of the bills a contract is alleged to have been entered into by the promoters of this corporation before the incorporation took place, because of which, in consideration of certain expenditures being made by certain citizens and inhabitants of Fulton, its chief office should be located in that city. The decided weight of authority is that contracts of this character, made by the proposed promoters of a corporation, do not render the latter liable thereon. The rule is well stated in Cook on Stockholders, (sec. 707,) where it is said: "Any other rule would be dangerous in the extreme, inasmuch as promoters are proverbially profuse in their promises, and if the corporation were to be bound by them it would be subject to many unknown, unjust and heavy obligations. The only protection of the stockholders and of the subsequent creditors against such a result lies in the rule that the corporation is not bound by the contracts of its promoters. The rule is just and should not be weakened." This principle is in effect sustained by *Seeberger v. McCormick*, 178 Ill. 404.

Whilst contracts of this character made by a promoter may be ratified by the corporation, and the benefits it has accepted may be enforced against it to the extent that it may be rendered liable for damages for failing to comply therewith where there is such a ratification, yet all subsequent members or stockholders cannot be precluded or the welfare of the corporation jeopardized or prejudiced by requiring it to perform some contract perpetually, where the interests of almost every person connected with the association or corporation may be disastrously affected thereby. In case of ratification, compensation may be had in damages for a violation thereof. It is

averred in the last three named bills that in the articles of association the place of the principal office was fixed at Fulton. This is, however, not averred to be a ratification of the contract of these promoters. It appears that on the application to the Secretary of State for a certificate of incorporation the place of the principal office was left blank, and that a certificate was refused by the Secretary of State because of such omission, and thereupon the city of Fulton was inserted as the place of the principal office. The pleading must be taken most strongly against the pleader, and the allegations of these bills do not amount to an averment of a ratification by the corporation.

As to the bill filed by the city of Fulton, that municipality is not authorized to sue in behalf of the citizens, residents and inhabitants thereof because of the alleged donations they may have made to the promoters of or to the Modern Woodmen of America. That municipality of itself could not extend municipal aid and benefit under the constitution, and it is not authorized to sue on behalf of inhabitants, residents or citizens thereof, and seek to protect their interests by litigation conducted in its name which may be attended with costs.

We cannot agree with the contention of the appellants that the consent of all the members of this association must be had before a removal of the principal office could be effected. To so hold would render the action of a single member sufficient to prevent the action of all the other members, and is not in accordance with the purpose of the articles of association, the statutes under which it is acting, or its welfare. One becoming a member of this association must know that the charter of the company is not unalterable. He must take notice of the fact that it is liable to be amended by the legislature, and that the company might accept such amendment. By his contract when he became a member, not only was there incorporated therein the provisions of the statutes

of the State as they then existed, but he is held to recognize the further principle that there is the right in the legislature to change the provisions of the charter as public good and the interests of the company may require. (*Illinois River Railroad Co. v. Zimmer*, 20 Ill. 654.) One becoming a member with this knowledge cannot assert a right in himself as existing which would prevent the acceptance of any legislation that might be adopted for the welfare of the association, and hence a single objection cannot take away the right of the corporation to accept this amendatory legislation and act thereon, thereby changing the place of the principal office. Neither can the objection of one or more members deprive the legislature of the State of its power to regulate, control and direct the procedure or powers of an artificial person created and brought into being by it. The object of the corporation, as stated in the statute and its articles of association, is the furnishing of life indemnity and pecuniary benefits to the widows and heirs of its members. Its manner of conducting its business, as between its members and the association, is through its local camps. There is no direct association between the member and the head camp other than through the representatives of the local camp in the head camp. The head camp, composed of officers and delegates, directs the policy of the local camps. The location of the principal office of the association is not a part of its plan for the benefit and advantage of an individual member of a particular camp. The principal place of business is more one of public convenience, for the general good of the association, and no individual member can acquire a right or interest as to the location of the principal office which is against the general good of a great majority of his fellow-members and the general benefit of the association.

Appellees gave notice of a purpose to move a dissolution of the injunction in the case of the city of Fulton as complainant, as also in the case of Parker J. Bennett,

complainant, and in the case of Leroy Baker, complainant, in vacation. The appellants, on appearing before the judge in accordance with this notice, entered a motion for a change of venue, which was denied, and that is assigned as error. Subsequently the cases proceeded to a hearing on bills and answer before another judge at a regular term of the Whiteside circuit court. A term had intervened between the dissolution of the temporary injunction and the subsequent hearing on bill, answers, replication and proofs. These appeals do not bring before us the question of the change of venue, nor is there incorporated in the certificate of evidence the facts on which the judge acted.

Under the evidence appearing in this record and under the legislation applicable to this corporation there was no error in the circuit court in dismissing the bills for want of equity. The decree of the circuit court of Whiteside county is affirmed.

*Decree affirmed.*

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WILLIAM D. KENT *et al.*

*v.*

GEORGE M. CLARK & Co.

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*Opinion filed October 16, 1899.*

**CORPORATIONS**—persons *assuming to act as directors before stock is subscribed are liable for debts contracted.* Persons who assume to act as directors of a corporation, and exercise corporate powers and contract debts in its name, before all stock named in the articles of incorporation has been subscribed for *in good faith*, are personally liable, under section 18 of the Corporation act, (Rev. Stat. 1874, p. 289,) for the debts so contracted.

*Clark v. Kent*, 80 Ill. App. 128, affirmed.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

This action was begun by appellee, against appellants, the directors of the Dubuque Building Company, an Illinois corporation, now insolvent, to recover for merchandise sold to the corporation. The suit was brought under section 18 of the Corporation act, to hold appellants, as directors, personally liable, jointly and severally, because they assumed to act as directors of the corporation and contracted debts in the name of the corporation, and otherwise exercised corporate powers, before all the capital stock named in its articles of incorporation had been subscribed in good faith.

The Dubuque Building Company was organized on August 10, 1894. On that date the articles of incorporation were recorded in the office of the recorder of deeds of Cook county. From these articles of incorporation it appears that John S. Brown, Walter H. Browne and James E. Dement signed the usual preliminary statement that they desired to form a corporation, to be known as the Dubuque Building Company; that its object was to operate an apartment building in Chicago; its capital stock \$100,000; the number of shares 1000; the amount of each share \$100; its duration ninety-nine years; its principal office in Chicago. It further appears by the report of two of said commissioners, Walter H. Browne and James E. Dement, that they opened books of subscription and that the stock was fully subscribed. The following is a true copy of such subscription:

"We, the undersigned, hereby severally subscribe for the number of shares set opposite our respective names, to the capital stock of Dubuque Building Company, and we severally agree to pay the said company for each share the sum of \$100, in such manner and at such time or times as the board of directors may determine:

Names.	Shares.	Amount.
E. J. Price.....	1	\$100
Walter H. Browne .....	995	99,500
Frederick P. Austin.....	2	200
John S. Brown.....	1	100
Fred W. Hatch.....		100"

It further appears from said report that the commissioners convened a meeting of said subscribers by notice pursuant to law; that said subscribers met and elected as directors E. J. Price, Walter H. Browne, John S. Brown, Frederick P. Austin and Harry B. Gutchess. This report of the two commissioners, Walter H. Browne and James E. Dement, is sworn to. They make oath that "the foregoing report by them subscribed is true in substance and in fact."

Immediately after filing the articles of incorporation the company proceeded in the work of erecting an apartment building, known as the Dubuque Apartment Building, in Chicago. It continued in business until December 23, 1895, when it made a voluntary assignment for the benefit of creditors to John S. Brown, assignee. A part of its indebtedness was a claim of \$660 of George M. Clark & Co., appellee, for gas ranges and labor furnished the building under written contract made in April, 1895. At the time this contract was made the appellants, William D. Kent, Samuel A. Treat, Thomas S. Dobbins and John R. True, were the managers or directors of the company and had been for some time prior thereto, and continued to be up to the time of the assignment, in December, 1895. William D. Kent was the president, Samuel A. Treat the secretary and John R. True the treasurer of the company.

On the trial the following stipulation was entered into in open court: "That on or about April 17, 1895, George M. Clark & Co. made a written contract with the Dubuque Building Company for the furnishing of gas ranges for the Dubuque building; that the ranges, under said contract, were actually furnished and went into the building, and that at the time of the assignment, December 23, 1895, there remained due from the Dubuque company, for goods furnished under said contract, the sum of \$660, none of which has been paid."

A corporation known as the Carolina Building and Hotel Company began the erection of this apartment building and failed. Among its creditors were appellants, or companies or firms in which they were interested. In an effort to save themselves as creditors of the Carolina company they undertook to complete the building, and with that object in view organized the Dubuque Building Company. The subscription for stock, as hereinbefore stated, was made for them and in their behalf without any intention on the part of the subscribers to take stock, but the subscribers in behalf of appellants and others were induced to sign the preliminary papers, subscribe for the capital stock and to become the first board of directors. None of those original subscribers assumed any responsibility or had any intention of paying any part of the subscription, but it is shown that the contractors whom they represented were to pay for stock to the extent of whatever amount might be due them for work done and material furnished to the Carolina company, or for the completion of the building under the management of the Dubuque Building Company. The capital stock was to be distributed among these contractors, but they assumed no obligation as to any cash payments for such stock. Upon the trial an admission was made by counsel for the appellants, to the effect that "there is no contention here that Mr. Brown was able to pay for that stock; he did not subscribe for it; he never intended to pay a dollar on it himself; he did not pay it himself." Brown subscribed for a majority of the stock on the organization of the Dubuque Building Company.

In the trial court finding and judgment were entered in favor of the appellants here. On appeal to the Appellate Court for the First District that judgment was reversed and judgment was entered in that court for \$660, the amount stipulated to be due the appellee. The Appellate Court made a special finding of facts, as follows: "The court finds that appellees, as directors of the Du-

buque Building Company, a corporation, assumed and exercised corporate powers in the name of said corporation, and contracted in the name of said corporation, with the appellant, the indebtedness of \$660 here sued for, before all the stock named in the articles of incorporation of said corporation had been subscribed in good faith." The Appellate Court, on granting an appeal to this court, entered a certificate of importance.

EDWARD STARTZMAN ELLIOTT, for appellants.

PADEN & GRIDLEY, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

It is provided by section 18 of the Corporation act: "If any person or persons, being or pretending to be an officer or agent or board of directors of any stock corporation or pretended stock corporation, shall assume to exercise corporate powers or use the name of any such corporation or pretended corporation without complying with the provisions of this act, before all stock named in the articles of incorporation shall be subscribed in good faith, then they shall be jointly and severally liable for all debts and liabilities made by them and contracted in the name of such corporation or pretended corporation." By special finding the Appellate Court found that the appellants assumed to act as directors of the Dubuque Building Company, a corporation, and assumed and exercised corporate powers in the name of the corporation and contracted in its name with the appellee, by which contract the indebtedness sued for herein was incurred, before all stock named in the articles of incorporation had been subscribed for in good faith. This finding of fact creates a clear liability under section 18, as held by this court in *Loverin v. McLaughlin*, 161 Ill. 417.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

J. R. JARRETT *et al.*

*v.*

THE CITY OF CHICAGO.

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*Opinion filed October 16, 1899.*

PUBLIC IMPROVEMENTS—*paving ordinance must specify height of curb required.* A special assessment ordinance for paving a street is invalid which fails to indicate the height of the curbing required in the construction of the improvement. (*Holden v. City of Chicago*, 172 Ill. 263, followed.)

WRIT OF ERROR to the County Court of Cook county; the Hon. C. M. BARICKMAN, Judge, presiding.

HILLIS & McCOY, (CHARLES S. McCOY, of counsel,) for plaintiffs in error.

CHARLES S. THORNTON, Corporation Counsel, and ARMAND F. TEEFY, for defendant in error.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is a writ of error to review a judgment of the county court of Cook county confirming a special assessment levied to defray the cost of curbing, grading and paving a system of streets in Chicago known as the "St. Lawrence avenue system."

The principal error assigned is, that the ordinance authorizing the street improvement, and upon which the assessment is predicated, is invalid, in that it fails to designate the height of the curbing required in the construction of the improvement. This same question was before this court in the case of *Holden v. City of Chicago*, 172 Ill. 263, and several subsequent cases, and the contention of plaintiffs in error was there sustained. The same reasoning urged by defendant in error in this case was presented and considered in those cases. We find no sufficient reason now for changing the conclusion there reached. The judgment below must accordingly be reversed.

*Judgment reversed.*

## THE GALESBURG AND GREAT EASTERN RAILROAD CO.

*v.*NEWTON M. MILROY *et al.**Opinion filed October 16, 1899.*

1. APPEALS AND ERRORS—*when amount of condemnation verdict will not be disturbed.* The amount of a condemnation verdict for land actually taken for right of way will not be disturbed, on appeal, where the jury viewed the premises and the verdict is within the range of evidence; nor will the amount awarded as damages for depreciation in the value of land not taken be disturbed where the jury viewed the premises and the evidence is sharply conflicting.

2. SAME—*when court's refusal to sustain objections to improper questions is not prejudicial.* The court's refusal to sustain an objection to improper questions is not prejudicial, when one of them was not answered and the other was replied to in such form as to render the error harmless.

3. EMINENT DOMAIN—*depreciation in market value is the measure of damages to land not actually taken.* In condemnation proceedings to acquire a right of way, where land not taken will be depreciated in actual market value by reason of the construction of the road, damages are recoverable in a sum equal to such depreciation.

4. SAME—*use to which land taken is adapted enters into the question of damages.* The value of land condemned for right of way should be estimated not only with reference to the use to which it is actually applied, but to the use to which it is adapted, if such latter use enters into and affects its market value.

5. INSTRUCTIONS—*when giving of instruction which does not enlighten the jury will not reverse.* The giving of an instruction which does not enlighten the jury on the issues is not reversible error, when, under the entire series, it could not have affected the verdict.

6. SAME—*jury are presumed to consider instructions as a whole.* The jury are presumed, in assessing the damages in condemnation proceedings, to consider the instructions as a whole, and to notice the qualifications which one instruction makes on another.

APPEAL from the County Court of Knox county; the Hon. PHILIP S. POST, Judge, presiding.

CARNEY, SHUMWAY & RICE, for appellant.

JAMES T. WASSON, EUGENE W. WELCH, and WILLIAMS, LAWRENCE & WELSH, for appellees.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

A petition was filed on October 5, 1898, in the county court of Knox county, by appellant, to condemn land for right of way. Cross-petitions by appellees were filed, alleging ownership of adjoining lands and claiming damages thereto by reason of the construction and operation of the railroad. On hearing, the jury found compensation and damage as follows: To Newton M. Milroy and Mary G. McCornack, \$690.25; to Charles D. Clark, \$600.95; to Frederick Becker, \$506.90. The petitioner entered a motion for a new trial, which was overruled, to which ruling exception was taken. Petitioner brings the record to this court by appeal.

The only questions presented for adjudication were as to the market value of the land actually taken, and what, if any, damage was sustained to land not taken. Three different land owners whose lands were sought to be taken and who filed cross-petitions to recover damages to adjacent lands were involved in the one petition.

Some ten or twelve witnesses were examined on each side as to the value of the lands taken for use for right of way, and the verdict of the jury as to compensation for land actually taken is not greater than the value fixed by some of the witnesses for the petitioner and less than that placed upon it by the witnesses for the land owners, and in neither of the three cases was the compensation for the land actually taken in excess of the value as fixed by some of the petitioner's witnesses. The jury went upon and viewed the land, and we are satisfied the evidence warranted the finding of the jury, in each case, as to the compensation to be paid for land actually taken.

On the question of the depreciation in value of the land not taken, so far as the land owners Milroy and McCornack are concerned, some twelve witnesses testified for the land owners, and the average amount of damage,

taking the entire testimony of all these witnesses, is a depreciation in value of \$927.08, whilst about the same number of witnesses called by petitioner fixed the amount of damage sustained by the land not taken at an average of \$215. Here, again, the jury went upon the land and inspected the same, and by their verdict found the damage to the land not taken to be \$550. It is clear that the evidence warranted this verdict. As to the land of Charles D. Clark, the jury found the value of the land taken to be \$260.95 and the damage to land not taken to be \$340. It was found that the value of the land of Frederick and Jane Becker taken for the use of the railroad was \$306.90 and damages to land not taken was \$200. In each case the jury went upon the premises, and their view of the premises is authorized to be taken by them as evidence in the case. Outside of the information derived by an actual view of the property, it is sufficient to say that the evidence is sharply conflicting, both as to the value of the land actually taken and the damage sustained by land not taken. The evidence is so conflicting that we would not feel warranted in disturbing the verdict of a jury, even though there was no actual view of the premises. Taking into consideration the information to be derived from the view of the premises, and the conflicting state of the evidence, we would not be authorized to disturb this verdict on a question of fact.

It is urged that there was error in the admission of evidence. The only questions pointed out in the brief of appellant on this branch of the case were the following: A witness was asked: "As to this fencing of the railroad, do you understand that they are not obliged to answer for damages to your stock if they get out of your fields?" The question was objected to by petitioner, objection overruled and petitioner excepted. It does not appear that any answer was made to this question. This question was then asked: "Did you consider the possibility of that being true?" which was objected to by petitioner,

objection overruled and petitioner excepted. Witness then answered: "No, sir; I have not considered that." By this answer the petitioner was in no way prejudiced, and the error was harmless. The questions were improper, as the only question to be determined as to land not taken was as to whether there was a difference in the actual market value by reason of the construction of the road. (*Metropolitan West Side Elevated Railway Co. v. Stickney*, 150 Ill. 362; *Metropolitan West Side Elevated Railroad Co. v. White*, 166 id. 375.) And whilst these questions could in no manner throw any light on the issue, and the objections thereto should have been sustained, yet one of them having no answer and the other being answered in the form it was, rendered the error harmless.

It is urged there was error in giving the twelfth and fifteenth instructions asked by land owners. These instructions are almost identically the same, the difference being that reference is made to the amount of damages, if any, sustained by two different land owners by name, and to which they would be entitled if certain acts were shown. The effect of the two instructions is to tell the jury that if the land not taken will be depreciated in actual market value by reason of the building of the road through it the jury should fix the damages at a sum equal to such depreciation. In this there was no error. *Metropolitan West Side Elevated Railway Co. v. Stickney, supra*.

It is insisted that the seventeenth instruction is erroneous, as it impresses on the jury that damages other than to the market value should be considered. That instruction is as follows:

"The owner of the land is entitled to the use and enjoyment of the same for the highest and best use to which it is adapted, and if you find, from all the evidence, that a large portion of the Milroy farm is by the proposed railroad cut off from the water supply and the several parts rendered inconvenient of access, so that the whole farm is depreciated in market value and damaged for all

time, then you should take such facts into consideration in estimating the damages."

Where land is condemned its value should be estimated not only with reference to the use to which it is actually applied but to the use to which it is adapted, if such latter use enters into and affects its market value. By the conclusion of the instruction the jury are expressly directed, if they find certain facts, to take them into consideration in estimating whether there is a depreciation in the market value of the farm as used and to the use to which it could be adapted. It was not error to give this instruction. *Rock Island and Peoria Railway Co. v. Leisy Brewing Co.* 174 Ill. 547.

Objection is taken to the eleventh instruction, which is to the effect that the railroad company is not bound to fence its track during the first six months, nor is it liable, after fencing its track, for any loss or damage accruing to the land owner by reason of stock escaping through any defective fence and getting onto the land of others, or getting into the cultivated fields of the land owner and destroying his crops, but only for damage to stock on its right of way, etc. The jury were clearly instructed with reference to the questions to be taken into consideration by them in determining the compensation to be paid for land taken and in determining damages to be awarded by depreciation in the market value of land not taken. The eleventh instruction in no way enlightened the jury on any of these questions, and was clearly improper and should not have been given. Its statement of propositions of law, so far as correct under the entire series of instructions, could not have affected the verdict. The jury are presumed, in making up their verdict in this class of cases, to consider the instructions as a whole and to notice the qualifications which one instruction makes on another. (*Toledo, Wabash and Western Railway Co. v. Ingraham*, 77 Ill. 309; *Cunningham v. Stein*, 109 id. 375.) With the full and explicit instructions correctly

given both for the petitioner and the land owners, it is apparent instruction 11 could not have misled the jury.

There is no such fatal error in this case as would authorize a reversal, and the judgment of the county court of Knox county is affirmed.

*Judgment affirmed.*

181	248
91a	8308
181	248
94a	585

181	248
195	619
195	620
101a	511

181	248
107a	122
107a	142
108a	68

181	248
207	171

181	248
209	1605

181	248
e212	1192

218	1188
214	1253

181	248
115a	1129

JAY LAWRENCE *et al.*

v.

JOHN T. LAWRENCE *et al.*

*Opinion filed October 13, 1899.*

1. TRUSTS—*a trustee's interest in real estate is commensurate with his powers.* A trustee empowered to convey land to the objects of the settlor's bounty acquires whatever estate, even to a fee simple, is needed to enable him to accomplish the purposes of the trust.

2. SAME—*trust is not passive if trustee is required to convey the title on happening of contingency.* If a trustee is required to convey the title to the beneficiaries on the happening of a certain event the trust is not a passive or dry trust, and the Statute of Uses does not operate to vest the title in the usee.

3. SAME—*legal title held by a trustee descends to his heirs subject to the trust.* The title to lands held by a trustee invested with the legal title does not remain in abeyance on the death of the trustee or vest in the courts of equity, but passes to the trustee's legal heirs, subject to the trust.

4. SAME—*voluntary trust for settlors' benefit requires no further consideration.* A trust created by deed, whereby land is voluntarily settled for the benefit of the settlors during their natural lives, with remainder in fee to and for the benefit of their heirs, and concerning which nothing remains to be done by the settlors to give it effect, may be enforced without regard to the presence or absence of any further consideration.

5. SAME—*revoking clause is not essential to validity of voluntary settlement.* In the absence of fraud, accident or mistake the validity of a voluntary settlement is not affected by the fact that the trust deed creating it does not contain a revoking clause.

6. PARTIES—*when trustee's heirs are necessary parties to bill to cancel trust deed.* Heirs to whom land held in trust by an ancestor has descended, subject to the trust, are necessary parties to a proceeding instituted for the purpose of divesting them of the title.

7. PLEADING—*allegation that grantors did not comprehend effect of deed must be supported by allegation of accident or mistake.* An averment that the grantors in a deed conveying land in trust did not comprehend the legal effect of the instrument furnishes no reason for vacating it, in the absence of an allegation of mistake or misunderstanding as to its purport and effect.

8. APPEALS AND ERRORS—*chancellor's findings presumed sustained by proof, in absence of certificate of evidence.* It will be presumed, in the absence of a certificate of evidence showing what testimony was produced orally, that the findings of the chancellor were supported by adequate proof.

9. SAME—*affirmative decree must be justified by the evidence in the record or by the specific findings of fact.* A decree in chancery granting affirmative relief must be supported, on error or appeal, by testimony preserved in the record or by the specific findings of fact recited in the decree.

10. DEEDS—*when trust deed is well delivered.* It is a good delivery of a trust deed where the grantor leaves it to be recorded in obedience to the trustee's instructions and with the intention of passing the title.

WRIT OF ERROR to the Circuit Court of Logan county; the Hon. CYRUS EPLER, Judge, presiding.

On the 12th day of August, 1868, the defendants in error, who are husband and wife, as parties of the first part and grantors, and one Eliza A. Lawrence, as party of the second part and grantee, executed a certain trust deed and acknowledged the same in compliance with the statute then in force with reference to the valid execution of instruments for the conveyance of real estate. By said deed said defendants in error conveyed certain lands in Logan county to the said Eliza A. Lawrence as trustee, to "hold the legal estate or title in the said premises to the sole and separate use and benefit of Frances Lawrence, wife of the said John T. Lawrence, for and during the natural life of the said Frances Lawrence, with full and absolute right to the said Frances Lawrence, during her lifetime, to enjoy the use, rents, issues and profits thereof, and upon her decease to hold the same to the sole and separate use and benefit of the said

John T. Lawrence for and during his natural life, with full power to the said John T. Lawrence, during his lifetime, to enjoy the rents, issues and profits thereof provided he shall survive his said wife, but if he shall not survive his said wife, then, in trust, upon the decease of the said Frances Lawrence to re-convey said premises, by a good and sufficient conveyance, to the legal heirs of him, the said John T. Lawrence." The deed also contained the following provision: "And it is further provided, that in case of the decease of the said party of the second part, or her legal incapacity, before the full execution, discharge and performance of all and singular the trusts in and by this deed created and declared, then the trust herein created shall be executed, discharged or performed by the court of chancery having jurisdiction within and for the county of Logan, and upon the happening of either of the contingencies last aforesaid the estate granted and conveyed in and by this deed shall vest in such court, subject to all and singular the trusts and confidences in this deed created and declared, and said court shall exercise the same powers and perform all and singular the trusts that may remain unexecuted, and perform with the same legal effect, as the said party of the second part might or could were he capable of performing the same, in such manner as said court may order and decree."

On the 15th day of August, 1896, the defendants in error exhibited their bill in chancery in the circuit court of Logan county praying for a decree declaring the said deed to be null and void and canceling the same and expunging it from the record. The bill alleged the said Eliza A. Lawrence had departed this life; that the complainants were in the possession of the said premises when the said deed was executed and have ever since remained in possession thereof; that the defendants to the bill (plaintiffs in error) are the children of the said defendants in error. The further allegations of the bill

are as follows: "Orators further represent that said trust deed is void because, first, the same was made without consideration for the execution thereof; second, because the said deed contained no provision by which the same might be canceled at the election of the grantors; third, that at the time said deed was executed they did not know that said deed did not contain a provision whereby the said deed might be canceled; fourth, that neither of orators comprehended the legal effect of said deed at the time of the execution thereof."

The adult defendants suffered default. The minors answered by their guardian *ad litem*, submitting their rights to the consideration of the court and demanding strict proof of the bill. The cause was heard on the bill, answers, proof taken before the master and proofs heard in open court, and decree entered granting the relief prayed in the bill. The defendants to the bill have prosecuted this writ of error to reverse the decree.

BROWN, WHEELER, BROWN & HAY, for plaintiffs in error.

J. T. HOBLIT, and BLINN & HARRIS, for defendant in error Frank E. Starkey.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The estate of a trustee in the real estate which is the subject matter of the trust is commensurate with the powers conferred by the trust and the purposes to be effected by it. The trustee acquires whatever estate, even to a fee simple, is needed to enable him to accomplish the purposes of the trust. (*Preachers' Aid Society v. England*, 106 Ill. 125; *West v. Fitz*, 109 id. 425; 27 Am. & Eng. Ency. of Law, 110-113, 117.) When the trustee is directed and empowered to convey the land to the objects of the settlor's bounty, the legal estate necessarily vests in the trustee. If a trustee is required to grant a fee, the fee must be

conferred upon him. (*Kirkland v. Cox*, 94 Ill. 400; *Preachers' Aid Society v. England, supra.*) Where, as here, the trustee is required to convey the title to the beneficiaries on the happening of a certain event, the trust is not a passive or dry trust and the Statute of Uses does not operate to vest the title in the usee. (*Kirkland v. Cox, supra; Preachers' Aid Society v. England, supra.*) The legal title to the premises here involved rested in the trustee. Upon her death the title did not remain in abeyance. Courts of equity may be vested with the power to appoint a successor to a trustee in whom title to lands may rest, but such title cannot descend to and vest in the courts of equity. The title held by the trustee in this instance, upon her death passed to her legal heirs, subject to the trust. (27 Am. & Eng. Ency. of Law, 92.) Such heirs were necessary parties to any proceeding instituted for the purpose of divesting them of such title. *Skiles v. Switzer*, 11 Ill. 533.

The allegations of the bill are insufficient to justify a decree vacating the deed. The trust was a voluntary settlement for the benefit of the settlors during their natural lives, with remainder in fee to and for the benefit of their heirs. It was perfectly created, so that nothing remained to be done by the settlors to give it effect, and it may be enforced without regard to the presence or absence of any further consideration. *Massey v. Huntington*, 118 Ill. 80.

The bill alleges that the grantors did not know the trust deed did not contain a revoking clause. But there is no averment they desired or expected such a clause to be inserted, or that accident, mistake or fraud in any way intervened. It is not indispensable to a voluntary settlement it should contain a power of revocation. "There is no such rule that the want of a power of revocation in a voluntary settlement, or the want of advice as to the insertion of such a power, will afford ground, in equity, for the donor to set aside such a settlement, but that the same is a circumstance, and a circumstance merely, to be

taken into account in determining upon the validity of the settlement, and of more or less weight, according to the facts of each particular case." *Finucan v. Kendig*, 109 Ill. 198; *Patterson v. Johnson*, 113 id. 559.

The allegation the grantors did not comprehend the legal effect of the instrument furnished no reason for vacating it. The bill does not allege the legal effect was different from what it was intended it should be, or that the grantors understood it would have any different effect from that which the law would give it. There is no averment of mistake, misapprehension or misunderstanding as to the purport and effect of the deed. The court, however, found the deed had not been delivered. The decree was entered upon proofs taken and reported by the master and proofs heard in open court. There is no certificate of evidence, hence we cannot know what testimony was produced orally. In such state of case we must assume the findings of the court were supported by adequate proof. Waiving the application of the rule that the allegations of a bill and the proof must correspond, and that a party is not entitled to relief, though the evidence may warrant it, unless there are averments in the bill to which the evidence may apply, we are of opinion the decree can not be supported on the ground there was no delivery of the deed. When a decree in chancery granting affirmative relief is brought into review on error or appeal, the rule is the decree must be supported by testimony preserved in the record or by the facts appearing from specific findings of fact recited in the decree. (*First Nat. Bank v. Baker*, 161 Ill. 281.) The decree recites that the deed was prepared by an attorney who was acting on behalf of the trustee, and as to the delivery thereof the facts are found and recited, as follows: "Said attorney, without explaining the contents of the said deed or the legal effect thereof, delivered said deed to complainant John T. Lawrence, who, together with his wife, Frances Lawrence, executed and acknowledged the same before a

justice of the peace, and after said deed had been signed by the trustee, Eliza A. Lawrence, with whom both of said complainants were then living, complainant left said deed with the recorder of Logan county to be recorded, under the instructions and directions of said attorney."

The law presumes much more in favor of the delivery of deeds in case of voluntary settlements than in ordinary cases of bargain and sale. (*Union Mutual Life Ins. Co. v. Campbell*, 95 Ill. 267; *Williams v. Williams*, 148 id. 426.) No formal delivery to the grantee or trustee in person is necessary. The intention of the party is the controlling element. (*Walker v. Walker*, 42 Ill. 311.) Here it appears from the findings of the court the deed was prepared by an attorney who was acting for the trustee, who, after it was prepared and was ready to be executed, handed it to the defendant in error John T. Lawrence; that said defendants in error then executed and acknowledged it; that it was then signed by the trustee, and that the defendant in error John T. Lawrence, by the instruction and direction of the attorney of the said trustee, took the deed to the recorder of deeds and left it with him to be recorded. The deed was duly spread of record by the proper recorder of deeds two days after it had been executed and more than twenty-eight years before the bill to cancel it was exhibited. No fact is recited tending to show it was not the intention of the grantors to deliver the deed, and in such state of case the act of the grantors in delivering the deed to the recorder to be recorded, in obedience to the directions of the trustee through her attorney, was equivalent to the manual delivery of the deed to the trustee. "Leaving the deed to be recorded will be a good delivery if done with the knowledge of the grantee, and with the evident or expressed intention that the title is to pass to the grantee." 5 Am. & Eng. Ency. of Law, 447; *Weber v. Christen*, 121 Ill. 91.

The decree must be reversed and the cause remanded.

*Reversed and remanded.*

TRUSTEES OF SCHOOLS  
*v.*  
ELIZABETH PETEFISH *et al.*

*Opinion filed October 18, 1899.*

TRUSTS—when township school trustees do not take title to land devised to school. A devise of lands to "the school" of a specified town, to be held in trust for the purpose of constituting a fund to defray the expense of teaching religion and morals, does not vest the title in the township trustees and their successors under the act of 1841, then in force, which did not provide that the title of all lands given for school purposes should be so held.

APPEAL from the Circuit Court of Cass county; the Hon. T. N. MEHAN, Judge, presiding.

The appellants, claiming to hold in trust the title to the lands described in the lease set out below, filed their bill in the Cass circuit court to construe the will of John Zuschke and to set aside said lease. John Zuschke died testate in Arenzville, then in Morgan and now in Cass county, in 1843. By the first clause of his will he directed that if his personal property was not sufficient to pay his debts, his executor should sell first his improved land. The second and third clauses were as follows:

"Second—After the payment of all my just debts and funeral expenses, I do hereby devise and bequeath the residue of my property to the school in Arenzville, for the purpose of constituting a fund forever, on which the rents or interest only shall be applied by the trustees or school directors of the public school in Arenzville to defray the expense of teaching religion and morals in the German and English languages.

"Third—If any or all my land shall remain unsold, not being necessary for the payment of debts, then it is my will that the same remain unsold, to constitute a principal of the school fund for a public school in Arenzville, the rents and revenues of which to be annually expended for the support of a common public school in Arenzville,

and in case any money remain in hand of my executor from the sale of my personal effects, the same to be laid out in further improvements on my farm."

His will was probated, and the directors of the public school of Arenzville assumed control of the two forty-acre tracts, and in 1853 made the following lease of them to Conrad Becker, the ancestor of appellees:

*"Know all men by these presents:* That the undersigned, school directors of Arenzville, for themselves and their successors, have this day sold on a lease of ninety-nine years, to begin on the first day of March, A. D. 1854, and to end on the first day of March, A. D. 1953, all the right, title and interest in them vested to the north-east quarter of the north-east quarter of section No. 5, in township No. 16, north of range No. 11, west; the south-east quarter of the south-west quarter of section 32, in township 17, north of range 11, west, known as the 'school farm,' donated by last will and testament by John Zuschke, deceased, for the support of schools in Arenzville, with all the improvements and privileges thereto belonging, to Conrad Becker, on conditions as follows: The above described real estate was on this day sold at public auction for the term of ninety-nine years to the highest responsible bidder, said Conrad Becker offering to pay each and every year the sum of \$71 semi-annually in advance, and to execute a bond of the sum of \$200 for the performance of the conditions of sale, namely: To make the semi-annual payments; to pay during the term of lease such taxes as may be assessed on said lands; to cultivate and husband the resources in improving and planting an orchard, line fences, and use the timber on said land for building purposes and fuel on said farm only, and at the end of ninety-nine years to deliver the premises, with all the improvements then being thereon, to the school directors or other authorized agents of the public school of Arenzville. A failure or neglect of complying with any of the foregoing conditions, the rights and privileges herein granted shall cease and the sole ownership revert to the school directors, for the use and benefit of said school or schools in Arenzville.

"In testimony whereof we have signed and sealed these presents the 26th day of November, A. D. 1853.

FRANCIS ARENZ, (Seal.)

D. B. WILSON, (Seal.)

F. PHILIPPI, (Seal.)

*School Directors of Arenzville."*

To the bill setting up the foregoing facts, the appellees, who are the heirs-at-law of the lessee, demurred. The court sustained the demurrer and dismissed the bill, and the complainants appealed.

**POLLARD & PHILLIPS, and E. L. CHAPIN, for appellants.**

**MORRISON & WORTHINGTON, and MILLS & MCCLURE, for appellees.**

Mr. JUSTICE CARTER delivered the opinion of the court:

The first, and perhaps the only, question to be solved in this case is, whether or not appellants have, under the will of Zuschke, any interest in the lands in controversy. If they have no interest, it is plain their bill was properly dismissed, even if the lease in question was made without authority. Their contention is, that as "trustees of schools of township No. 17, range No. 11," the title to the land in controversy is vested in them in their corporate capacity, in trust for the purposes mentioned in the will; that they are, by virtue of the statute, the legal successors of the trustees of school lands appointed by the county commissioners court under the act approved February 26, 1841, or of the trustees of schools of the township authorized to be elected under certain sections of that act, which act of 1841 was in force when Zuschke's will took effect, and that upon the death of Zuschke said land passed to such trustees so appointed or elected under said act of 1841.

Our attention is called to section 5 of said act, which declared such trustees to be "a body politic and corporate," etc., and to section 6, which provided: "The said trustees shall be vested with the following powers, viz.: \* \* \* To receive, by deed or otherwise, and hold for the use of any school or schools in the township, any real estate, personal property or money which may be

conveyed or delivered to them for the uses aforesaid." (Laws of 1841, p. 259.)

It is clear that under that act such trustees, if appointed, had the power to take these lands and hold the title in trust for the public school in Arenzville if the devise had been to them. But the lands were not devised to them, but were devised to "the school at Arenzville," by which was meant, as shown by other language employed, the public school in Arenzville. There is nothing in the will which discloses any intention on the part of the testator to vest the title in the trustees of school lands or to give them any control over the property whatever. The statute did not then, and does not now, provide that the title to all property held for the common or the public schools should or shall be vested in the township trustees. In *Heuser v. Harris*, 42 Ill. 425, where a will gave to a school district one-half of the proceeds of the sale of a farm, but to be under the control of some person to be elected by the people of the district every four years, and the other half to "the poor of Madison county," it was contended that the will was void for uncertainty, and that the law vested in the school directors the custody and control of all school moneys of the district and that no other persons were authorized to take charge of such moneys, but it was held that the will was valid, and that if no trustee were elected, a court of equity had power to provide other means of carrying into effect the charitable bequest of the donor. True, it is not contended in this case that the devise is void, but only that the title vested in appellants' predecessors as trustees, because, as it is said, they were the only persons or corporation, within the provisions of the will, authorized by law to take the title. But, as we have seen, they do not come within the designation of devisee mentioned in the will, and it cannot be inferred from any provision of the will or the language used that it was the intention of the testator to vest the title to the land in the trustees

of school lands of the township. While the devise is clearly a gift to a charitable use and would be enforced by a court of equity, (*Hunt v. Fowler*, 121 Ill. 269; *Andrews v. Andrews*, 110 id. 223; *Crerar v. Williams*, 145 id. 625; *Alden v. St. Peter's Parish*, 158 id. 631; *Heuser v. Harris, supra*;) it does not follow that in order to enforce it the legal title must be declared to have vested in the trustees of school lands, or their successors, the trustees of schools of the township authorized to be elected under section 61 of the act of 1841 then in force. Section 47 of that act provided that whenever a school should be organized, the employers of the teacher should meet together at the school house and appoint three of their number as trustees of the school and invest them with power to conduct and manage the school, and section 91 provided that where school districts had been laid off the legal voters of each of such districts should elect three "school directors" for the term of two years. Construing the will with reference to the law as it then was, it is perfectly clear "*the trustees or school directors of the public school in Arenzville*," mentioned in the will, were the trustees and the school directors who, under the law, should, respectively, according to the status of the school, have the management of such school. It will be observed that the statute did not provide that the title to all lands given for school purposes should be vested in the township trustees, and as the will did not so vest it in the case at bar, they took no title, and their successors, the appellants, have no title or interest whatever in the property. This being so, we do not feel authorized, upon their bill, to pass upon the validity and binding force of the lease.

The decree of the learned chancellor dismissing the bill was correct and will be affirmed.

*Decree affirmed.*

GLEN WALKER *et al.*

*v.*

ANNA A. WALKER *et al.*

*Opinion filed October 16, 1899.*

181 260  
195 410  
195 412

**HOMESTEAD**—minor children living with divorced wife are entitled to homestead. An estate of homestead should be set off jointly to the widow and minor children of the deceased head of the family although some of the children were born to the deceased by a divorced wife, with whom they have resided since the divorce decree, which forfeited her rights in the property but not the children's.

APPEAL from the County Court of Tazewell county; the Hon. GEORGE C. RIDER, Judge, presiding.

DAN R. SHEEN, and A. KREISMAN, for appellants.

FRANK B. MCKENNAN, and N. W. GREEN, for appellees.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

This is an appeal from an order of the county court of Tazewell county in a proceeding brought by Frank Walker, administrator of the estate of William Walker, deceased, for the sale of lands to pay debts. The deceased, at the time of his death, was in possession of the lands sought to be sold, consisting of one hundred and sixty acres, and was occupying the same as a homestead. With him resided his widow, Anna A. Walker, and their child, George Walker, who was about four years old, and Winnifred Walker, about fourteen years old, a child of the deceased by a divorced wife, Meda Walker. Shortly after his death another child was born, who died about a month afterwards. Two other children of the deceased, to-wit, Jane Lenore Walker and Glen Walker, aged, respectively, about ten and twelve years, lived with their mother, Meda Walker, to whom, by the decree of divorce, was given their care, custody and education, the

care, custody and education of Winnifred having by said decree of divorce been awarded to the deceased, William Walker. After William Walker's death, Meda Walker, the divorced wife, obtained a modification of the decree, by which modification the care, custody and education of Winnifred were also awarded to her, and she took Winnifred home to live with her. The divorce between the deceased and Meda Walker was obtained for the fault of the wife, and by the decree she was divested of all right of dower or jointure, and was made to forfeit all rights in the estate, real or personal, of William Walker, and was given no alimony, but he was required to pay to her the sum of \$200 annually for the care and education of the two children placed in her custody. All the above named were made parties, and also one Abram Brokaw, who holds a \$6000 mortgage given by Walker and his wife on the premises.

The petition sets out that Anna A. Walker is in the possession of the property, and avers that she is entitled to homestead and dower in the premises, and asks that the same may be set off and assigned to her, or that the lands be sold subject to said dower and homestead rights. Anna A. Walker answered, admitting the averments of the petition, and setting out that she is entitled to a double child's portion because of the death of her son Frank, and asks that before any order or decree of sale of the real estate be made, her dower and homestead be allowed and set off to her therein, and that said dower and homestead be allowed out of that part of the premises upon which the homestead is now situated. All the minors answered by their guardian *ad litem*, and Winnifred, Jane Lenore and Glen Walker answered by Meda Walker, their mother, as their guardian, claiming to have a homestead interest in the premises, together with Anna A. Walker.

At the January term, 1899, the court appointed three commissioners to set off the dower and homestead estate of Anna A. Walker. They afterwards made report that

they set off to her ten acres, including the house, as homestead, and fifty acres adjoining as and for her dower. The appellants, Winnifred, Glen and Jane Lenore Walker, by Meda Walker, their guardian, and George W. Cunningham, their guardian *ad litem*, moved the court to set aside said finding and report. In their motion they further asked the court to decree and find that they have a joint right and interest with Anna A. Walker in and to said homestead estate. The motion was overruled and exception taken. The court thereupon entered its final order, approving the report of the commissioners and ordering sale of all the property except the ten acres set off to the widow as homestead, subject to the mortgage and the widow's dower rights.

The question, then, for adjudication by this court is, whether, upon the death of the father, his widow only living with him at the time of his death and occupying the home, such widow was entitled to an estate of homestead, or whether the same should have been set off to her and the children of the deceased, jointly; and, if the children are entitled to participate in such allotment, whether children of the deceased and the widow jointly, as well as children of the deceased by a former wife and not living with her, are entitled.

Section 2 of chapter 52 (Hurd's Stat. 1897, p. 815,) provides that "such exemption shall continue after the death of such householder, for the benefit of the husband or wife surviving, so long as he or she continues to occupy such homestead, and of the children until the youngest child becomes twenty-one years of age." Section 4 provides: "No release, waiver or conveyance of the estate so exempted shall be valid, \* \* \* if the exemption is continued to a child or children, without the order of a court of competent jurisdiction directing a release thereof."

In the case of *Kingman v. Higgins*, 100 Ill. 319, we held that the widow could abandon her homestead, and, by

taking her own child with her, bind it to an abandonment and consequent release of the homestead, but that such abandonment would not affect her step-children, (the children of the deceased,) and that they would still be entitled to the homestead, and that the widow could not release the estate of homestead by deed so as to bind them. The court say (p. 325): "Being the natural guardian of her own child she had its custody and control, and had the right to remove it permanently from the homestead, and thereby abandon all its claim to the estate of homestead. She possessed that power to the same extent that the head of a family may remove his family from and abandon the homestead." Continuing, the court, with reference to the rights of her step-children, say: Their "rights depend on a different principle. The law does not impose on the step-mother the duty of supporting them, nor does it give her a right to their custody. \* \* \* The statute conferred the right (of homestead) upon them all alike. \* \* \* They took, as against creditors, the same rights as did the widow." This case was followed by *Capek v. Kropik*, 129 Ill. 509, where we held that where a sale of the homestead is had, the proceeds thereof should be distributed to the surviving householder and the step-children in proportion to their respective interests.

In *Hayack v. Will*, 169 Ill. 143, it was held that consent by a widow to the sale of the homestead in her deceased husband's estate is conclusive upon minor children and extinguishes their homestead interest, but that this is not so where the widow stands in the relation of step-mother to the children.

In *Stunz v. Stunz*, 181 Ill. 210, the testator devised one-third of the net income of his estate to his wife during life, and provided that she should enjoy the right to live on the homestead, "but not to the exclusion of my children, until she shall marry again." A posthumous child having died, the widow filed her bill for partition between

herself and three children of deceased by a former wife. The decree entered found that the widow had a homestead interest in the premises of \$1000, and a decree of partition and sale was entered, subject thereto. It does not appear whether the step-children resided with the deceased at the time of his death or not. This court, on writ of error, held the decree of the circuit court to be erroneous in failing to decree an estate of homestead in the children.

In *Lagger v. Mutual Union Loan Ass.* 146 Ill. 283, this court, in construing the effect of a mortgage with release of homestead and with covenants of warranty, executed by the mother, as owner, in fee, through an administrator's deed which was set aside, upon the homestead estate to which her children became entitled upon the death of their father, said (p. 303): "The latter clause of section 3, which provides that no release of the homestead shall be valid without an order of court if the exemption is continued to a child or children, does not refer exclusively to a case where such child or children occupy the homestead alone and without the presence of either parent. The exemption is continued to the children, as well when they occupy the homestead jointly with the surviving parent, as when they occupy it alone after the death or desertion of the surviving parent. It follows that there must be an order of court to make the release of the homestead valid as well when the children are occupying it jointly with the surviving parent as when they are occupying it alone. \* \* \* In *Kingman v. Higgins*, *supra*, the father died owning the premises, and occupying them as a homestead and leaving children by a former wife, and also leaving a second wife and her infant child. The widow took her own child and went to her father's house, abandoning the homestead and leaving it in the possession of her step-children. It was held that she and her child lost the right of homestead but that the other children retained it, and that their homestead could

not be released without an order of court. But the case is not authority for the position that the release could have been made by the widow without an order of court if she and her child had remained with the other children, she and they jointly occupying the premises as a homestead."

It is clear, under the authorities above cited, that had the step-children been living with their father at the time of his death and occupying the premises for their home, the homestead would enure to them jointly and equally with the widow. Nor do we understand counsel for appellees to contend otherwise, but they insist that because of the decree of the circuit court awarding the care, custody and education of the children to their mother, Meda Walker, and her taking the children to live with her away from the premises, they have lost or forfeited the homestead estate therein. By the divorce proceeding and decree thereunder the children were not given a new or separate home. Indeed, no provision of alimony or aught else was made for them, but the court found the mother to be a proper person with whom to entrust their keeping, and provided the father should pay \$100 annually for each in contribution towards their support. Under that proceeding she forfeited all rights to the homestead, but it were to institute a harsh rule to say that the children must likewise suffer. To so hold would be to read into the statute a meaning of which it is not susceptible. Section 2 above quoted does not name as a condition precedent to the taking or enjoyment of the estate, so far as the children are concerned, that they must occupy the homestead, but continues the exemption, without qualification, until the youngest child becomes twenty-one years of age.

Where a mother is in full possession of the homestead with her own child, and of her own free will leaves, taking her child with her, with the intention of abandoning her homestead, we have held that her act binds the

child, and that the welfare of the child in such a case can safely be trusted to a mother's judgment, love and maternal solicitude for her offspring. Here the mother has by no determination of hers sought, either for herself or her children, to abandon or forfeit the homestead, but is actively asserting her children's right thereto. Neither could she release the homestead, so as to bind her children, without an order of court permitting same, and that has not been done in this case. It is equally clear that the children could not contract so as to release the same. Being minors, they would not be bound by any acts done or agreement made to that end. As minors, it is the duty of the court to determine for them their rights as fixed by law. The statute has fixed these rights.

The county court erred in finding Anna A. Walker, only, entitled to the estate of homestead, and in having the same set off to her. The order and finding should have been that she and all of deceased's children were entitled, and should have ordered homestead set off to them jointly.

The judgment of the county court is reversed and the cause remanded, with directions to enter final order and judgment in accordance with what is here said.

*Reversed and remanded.*

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THE GRAND PASS SHOOTING CLUB  
*v.*  
FRANK L. CROSBY.

*Opinion filed October 16, 1899.*

1. APPEALS AND ERRORS—*objection to sufficiency of foundation for deed records must be made below.* An objection that no sufficient foundation was laid for the introduction of deed records because the custodian was not called to identify them cannot be urged in the Supreme Court when not specifically raised below.

2. EVIDENCE—*Auditor's certificate is evidence that swamp lands were ceded to county.* The Auditor's certificate that specified lands within

a county were ceded to it as swamp lands is made evidence of the fact by the act of 1854.

3. *SAME*—*it is presumed that a circuit court of a foreign State is a court of record—admission of deeds.* It will be presumed, in support of a certificate made by the clerk of the circuit court of another State attesting that a deed was executed in conformity with the laws of such State, that the circuit court is a court of record, and such deed may be read in evidence under the second subdivision of section 20 of the act on conveyances, (Rev. Stat. 1874, p. 276,) providing therefor when a certificate of conformity made by any clerk of a court of record of a foreign State is attached.

4. *SAME—acknowledgment of foreign deed may be shown to be in proper form by introduction of statute book.* That a deed executed in another State was acknowledged in conformity with its laws, so as to render it admissible in evidence, may be shown by the introduction of the statute books of such State purporting to be printed under its authority.\*

APPEAL from the Circuit Court of Greene county; the Hon. OWEN P. THOMPSON, Judge, presiding.

HENRY T. RAINY, for appellant.

NORMAN L. JONES, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

This is an action of ejectment brought by appellee, against the appellant, in the circuit court of Greene county, to recover possession of eighty acres of land.

Appellee claims title to the land as being alleged swamp land conveyed to him by Greene county, and he shows a connected chain of title through numerous *mesne* conveyances, by which the title is vested in him. For the purpose of showing these lands were swamp lands, appellee offered in evidence a certified copy of lands granted to Greene county under the Swamp Land act. The certificate of the Auditor was objected to. In *Keller v. Brickey*, 78 Ill. 133, it was held that the act of Congress of September 28, 1850, vested the title of swamp lands in

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\*The authorities as to the proof of foreign laws are collected in a note to *State v. Behrman*, (N. C.) 25 L. R. A. 449.

the State without any further act being done, and the State, having competent authority, passed the title to the counties by act of the legislature. By the act of the legislature of 1854 the certificate of the Auditor is made evidence of the fact that the lands were swamp lands, and his certificate, certifying to the same as the lands being within and belonging to the county and ceded to the county by act of the General Assembly of 1852, is made evidence of the fact, and the objection to the introduction of such certificate was properly overruled. In *Wabash, St. Louis and Pacific Railway Co. v. McDougal*, 118 Ill. 603, it was held the county would be absolutely invested with the title whether the certificate of the Auditor was granted or not. But the statute making that certificate evidence of the fact is conclusive of the question here raised. See, also, *Gilbreath v. Dilday*, 152 Ill. 207.

Numerous other deeds offered in evidence were objected to by the appellant because no sufficient foundation had been laid for the introduction of the record, and it is insisted that the clerk had not been called to testify that the books in question,—the deed records,—were a part of the records of his office and in his custody. It sufficiently appeared from oral testimony that the original deeds were lost, that a diligent search had been made therefor, that the same were not in the power of appellee to be produced, and were not intentionally destroyed or in any manner disposed of for the purpose of introducing a record of such deeds. On such proof being made the records were produced in open court in the presence of the clerk of the court, who was the custodian thereof, as he was an officer of the court trying the case. The objection that no sufficient foundation was laid for the introduction of the deed records because the custodian was not called to identify the same, cannot be raised for the first time in this court. Before an objection of that character can be availed of, the person making the same must specifically call the attention of the court to the ground

of the objection, that it may be obviated when the attention of the opposite party is called thereto. *Chicago, Peoria and St. Louis Railway Co. v. Nix*, 137 Ill. 141; *Benefield v. Albert*, 132 id. 665.

A deed was offered in evidence which was acknowledged before a notary public of Franklin county, Indiana. The acknowledgment was proved by the hand and notarial seal of such notary and was dated October 3, 1881. To this deed there was appended the certificate of the clerk of the circuit court of Franklin county, State of Indiana, that on the third day of October, 1881, the form of acknowledgment as used in the deed was in conformity with the laws of that State in relation to the acknowledgment of deeds. By the proviso to the second subdivision of section 20 of chapter 30 of the Revised Statutes of this State, where any clerk of a court of record of another State shall, under his hand and seal of such court, certify that the deed is executed and acknowledged in conformity with the laws of such State, such deed may be read in evidence, etc. It will be presumed that the circuit court is a court of record, and the certificate of conformity, taken in connection with the acknowledgment, is sufficient.

Another deed was offered in evidence acknowledged before a notary public of Rush county, Indiana, which deed is dated October 23, 1888. The certificate of acknowledgment is of the same date of the month but is blank as to the year, and objection is made that it was not in compliance with the form of acknowledgment required by the laws of the State of Illinois. The plaintiff offered in evidence a copy of section 2947 of the Revised Statutes of the State of Indiana as it appears by a supplement to a revision of the Revised Statutes of the State of Indiana for the years 1883, 1885 and 1887, which copy of such supplement of the session laws, by the title page, appears to be published by authority of the General Assembly of the State of Indiana. The ac-

knowledgment to the latter deed was in conformity with the form prescribed by the section above mentioned, which was sufficiently proven as provided by section 10 of chapter 51 of the Revised Statutes of Illinois, which provides that the statute books of the several States purporting to be printed under the authority of said States shall be evidence in all courts of this State of the acts therein contained. The objections to the sufficiency of the acknowledgment of the foregoing deeds were not well taken and were properly overruled.

Numerous other deeds were offered in evidence and objections made thereto of a character which we do not deem it necessary to further consider.

No evidence was offered by the defendant, the appellant here, and we find no error in the admission of testimony for the plaintiff. The evidence clearly authorized a judgment for the plaintiff.

We find no error in the record, and the judgment of the circuit court of Greene county is affirmed.

*Judgment affirmed.*

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THE CHICAGO, WILMINGTON AND VERMILION COAL CO.

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

*Opinion filed October 16, 1899.*

1. MINES—*mine inspection fees are not taxes.* Mine inspection fees are not taxes, but are imposed as compensation for presumably beneficial services rendered.

2. SAME—*provision of act requiring payment of mine inspection fees is constitutional.* The provision of section 11 of the act on mines, as amended in 1895 and 1897, (Laws of 1895, p. 252; Laws of 1897, p. 269;) requiring mine owners to pay the inspection fees charged by the State mining inspectors, is a valid exercise of the police power and does not violate any provision of the constitution.

3. SAME—*constitution does not deprive legislature of its right to provide for mine inspection fees.* The requirement of section 29 of article 4 of the constitution, that the General Assembly shall pass laws for

the protection of operative miners in reference to ventilation and escapement shafts, does not deprive the legislature of its right, in the exercise of its police power, to provide for the payment of inspection fees by mine owners.

4. *SAME—effect of failure of Mine Inspection act to limit number of inspections.* The failure of the Mine Inspection act to limit the number of inspections which may be made does not authorize daily or unnecessary inspections, to the destruction of the owner's business, as the inspectors are expressly forbidden to do any act tending to the injury of miners or operators of mines.

APPEAL from the Circuit Court of Sangamon county; the Hon. ROBERT B. SHIRLEY, Judge, presiding.

The plaintiffs, the People of the State of Illinois, brought suit against the defendant coal company to recover on account of inspection fees of the State mine inspector for certain mines theretofore inspected. The suit is brought to recover for the fees provided for under an act entitled "An act providing for the health and safety of persons employed in coal mines," approved May 28, 1879, and amendments thereto. The case was tried under a stipulation as to the facts.

It appears that the appellant owns six coal mines in this State, in each of which more than six men are employed. One of these mines is in the second mining district and five are in the first district. Between the first day of November, 1895, and the first day of July, 1897, in the first district, the mines were inspected twenty-two times, for which the aggregate sum of \$216 was charged, and between the first day of July, 1897, and the twenty-seventh day of April, 1898, seven inspections were made, for which \$70 was charged. The mine in the second district, between the first day of November, 1895, and the twenty-seventh day of April, 1898, was inspected four times, for which \$40 was charged. The aggregate of the charges for the inspections thus made was \$326. The defendant, by the stipulation, admitted the amount was due if the plaintiff was entitled to recover, and submitted two propositions of law to be held, to the effect there

could be no recovery under either count of the declaration, which were refused and exception taken. A motion in arrest of judgment was entered, which was denied, and a finding and judgment had in favor of the plaintiffs for \$326, to which the defendant excepted.

The question is presented whether the act of July 1, 1895, and the amendment thereto in force July, 1897, providing for the payment into the State treasury by owners or operators of coal mines of this State of the charges made by State mine inspectors for inspecting the mines, are valid enactments.

CHARLES W. THOMAS, (GEORGE S. HOUSE, of counsel,) for appellant.

E. C. AKIN, Attorney General, (C. A. HILL, and B. D. MONROE, of counsel,) for the People.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

Section 29 of article 4 of the constitution is as follows: "It shall be the duty of the General Assembly to pass such laws as may be necessary for the protection of operative miners, by providing for ventilation when the same may be required, and the construction of escapement shafts, or such other appliances as may secure safety in all coal mines, and to provide for the enforcement of said laws by such penalties and punishments as may be deemed proper." This provision requires the legislature to pass such laws as may be necessary, etc., and leaves to that body the determination of the policy of the State as to what legislation is necessary to conform to its requirements.

The legislature has seen proper, in the act entitled "An act providing for the health and safety of persons employed in coal mines," approved May 28, 1879, and in force July 1, 1879, and by the amendments thereto, to

require certain duties to be done and performed by the owner, operator or manager of a coal mine. Some of these duties are as follows: Section 1 provides that the owner shall make or cause to be made an accurate map, to be furnished to the State inspector of mines of the district. Section 2 provides the inspector may make a map at the expense of the owner, should he neglect or refuse so to do. Section 3 is as to the manner of construction of escapement shafts, etc. Section 4 is as to the ventilation of mines. Section 5 requires that bore holes shall be kept twenty feet in advance of each working place, under certain circumstances. Section 6 is as to hoist-ways, and who may be employed, etc. Section 7 is as to operating the hoist-ways. Section 8 is as to the fencing the shaft. Section 11 provides for the division of the State into districts, for the appointment of inspectors, and prescribes their duties and fixes their salaries. This latter section was amended in 1895. Prior to that time the inspector was paid wholly by the State, but after the amendment of 1895, and by the amendment of 1897, it was provided that fees might be charged, which were required to be paid by the mine owner. It is these two amendatory statutes which the appellant contends are unconstitutional, as placing a burden that is unreasonable and unjust onto the mine owner.

The object and purpose of the statute are the protection of miners working in coal mines. Whilst the act is an effort on the part of the General Assembly to strictly comply with section 29 of article 4 of the constitution, by providing for the ventilation of mines, the construction of escapement shafts, and such other appliances as shall secure safety in all coal mines, the General Assembly has seen proper to include a provision for the preparation of maps and the filing of the same with the chief mine inspector of the district, and that on neglect or default of the owner to make such map the inspector may make the same at his expense,—and this is one of the

requirements of the statute which has been held constitutional by this court. In *Daniels v. Hilgard*, 77 Ill. 640, it was held (p. 643): "Our legislature, in an act having for its avowed object the providing for the health and safety of persons employed in coal mines, has thought it proper to incorporate this provision for the making of a map. The law-making powers elsewhere, as it is seen in their laws for the same object, have adopted this same provision. This would seem to indicate as the legislative understanding that the provision is one in aid of the accomplishment of the purpose of such acts,—the protection of persons engaged in such mines; a proper part of the system adopted to that end. The question is properly one of legislative determination. A court should not lightly interfere in such case. The legislature must have manifestly transcended its province for it to do so. We are of opinion that it is not for a court to say that the provision here, which is called in question, is anything more than a fair and reasonable police regulation with reference to the subject matter of the act, which the legislature, in its discretion, has seen proper to adopt, and that it should not be set aside as unconstitutional."

To a much greater extent the provisions of section 11, which prescribe the duties of the inspectors, and require his reports and statements to be posted in a conspicuous place, showing the condition of the mine, and what, in his judgment, is necessary for the protection of the lives and health of persons employed in such mine, etc., are an exercise of the police power of the State. The examination of the condition of the mine would also necessarily require the inspector to examine and report as to whether the manner of construction of escapement shafts, air shafts and the ventilation of the mine is in conformity with the requirements of the statute. Inspections are necessary in determining health and quarantine laws, and also with reference to the examination of articles to be used as food, and it never has been held that a provision

looking to the inspection of certain articles that may be offered for sale for the purposes of human food, or a law providing for inspection with reference to health, is an improper exercise of the police power. Nor could it be held that the provision of the statute with reference to the appointment of inspectors for coal mines, who are to discharge the duties imposed upon them by section 11, is not a proper exercise of the police power of the State. The very purpose and object of the statute are in regard to the health and safety of miners, and requiring that mine owners should permit an inspection of their mines for this purpose is but an exercise of such police power.

We do not understand the contention of the appellant to be, however, that these provisions of the statute are an improper exercise of the police power, but understand the contention is that the provisions of the statute which require a fee to be paid for such inspection by the mine owner are an improper exercise of the police power. It was held in *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, that an inspection fee imposed by the State of Louisiana on a vessel passing a quarantine station, for examination as to her sanitary condition and the ports from which she came, is a compensation for services rendered the vessel, and not a tax imposed, within the meaning of the provision of the constitution concerning a tonnage tax imposed by the States, and that the act imposing such fee is a valid enactment.

Inspection fees are not taxes, but are imposed under the principle that they are compensation for services rendered in and about making such inspection, which is presumably beneficial to the person upon whom the fees are imposed under and by virtue of the general police powers of the State. *City of Charleston v. Rogers*, 2 McCord, 495; Cooley on Taxation, 413.

It was held in *People v. Harper*, 91 Ill. 357, that the legislature had full power to pass a law committing the

inspection of grain to a board created for that purpose; that the expenses occasioned by such inspection may be required to be borne by those presumably benefited by it; that the fixing of fees for such services and prescribing the manner of their collection and upon whom they shall be imposed do not fall within the constitutional limitations concerning the imposition of a local burden by way of taxation. In that case the board of warehouse commissioners fixed the fees for the inspection of grain. The court held (p. 369): "There is no provision of the constitution which, either expressly or by necessary implication, inhibits the General Assembly from committing the inspection of grain to a board created for that purpose, and we are not authorized to say that the board of commissioners of railroads and warehouses is not quite as legitimate as any other board that could have been selected or created for that purpose. It evidently was not designed that the inspection should be made a source of revenue, either to the State or to municipalities, for it is not enjoined as a means of raising revenue, but solely 'for the protection of producers, shippers and receivers of grain and produce;' and there is natural justice in requiring that the expenses occasioned by the inspection should be borne by those presumably benefited by it. Certainly no clause of the constitution is violated by this requirement."

The mining of coal is recognized as a dangerous and hazardous business, and is a productive industry of the greatest importance. For many years in this State many thousands of men have been engaged in that character of work, and a proper safeguard of their lives and health is a matter of so great interest and necessity that no subject can be mentioned where there is a more positive necessity for the exercise of the police power than in seeking to subserve their safety. With a recognition of the fact that under the police power the legislature has the right to provide for the inspection of mines, it may

also provide for the payment of fees for such inspection, and may place the burden of the payment of such fees on the business that requires the employment of men in such dangerous and hazardous work, to an equal extent as it may place the burden on commerce in the shipment of grain, and appeals much more strongly for a proper enforcement of this character of law by proper inspection than the mere protection of trade. If an inspection is to be had, it is attended with expense. The expense thus incurred is imposed because of the peculiar dangers of the surrounding situation, and subserves not only the interest of the miners, but alike protects the mine owner, and hence the burden of the payment of the fee can be properly imposed upon the mine owner without violating any provision of the constitution.

Appellant contends that legislation, under the provisions of section 29 of article 4, can only be had with reference to ventilation and escapement shafts. Such contention cannot be sustained, because that section requires legislation for a particular purpose having in view the safety of miners, and submits to the legislature the policy to be pursued for the accomplishment of that end, and which cannot lightly be interfered with by a court. Appellant, from the position taken, seems to disregard the fact that the legislature may legislate, under the police power which it possesses, outside of the mere mandates of that provision of the constitution. The contention is entirely too narrow.

Appellant further contends that, inasmuch as the specific time or occasion when inspections are to be made is not limited, power exists in the inspectors to inspect daily and unnecessarily, and impose a burden, by the imposition of fees, which would, in effect, destroy the business of the mine owner. Whilst the act requires that there must be at least four inspections a year, and imposes the duty on the inspectors to make the inspection as often as may be deemed necessary and proper, yet

they are made subject to removal for neglect of duty or malfeasance in the discharge of duty, and it is expressly provided that they "shall not be guilty of any act tending to the injury of miners or operators of mines during their term of office." An attempt to impose unreasonable inspections, such as it is insisted by counsel for appellant they may do, would be an act tending to the injury of the operators of mines, for which the very provisions of the act provide a means of prevention, and the law is not so powerless that it could not prevent extortions of this character. From the stipulation of facts under which this case was tried, it appears that appellant's mines were inspected thirty-three times between November 1, 1895, and March 30, 1898,—a period of two years and five months,—during which time the appellant owned and operated six mines. Hence there was only an average of one inspection every five and one-third months. It is true that mine No. 2, as appears from the facts, was inspected March 5, 1897, and was again inspected March 10, 1897. The facts and circumstances which induced the second inspection so soon after the other are not in any manner explained; but it may well be that because of the explosion of gas, or the obstruction to ventilation in the mine, or from some other cause resulting in inability to reach the escapement shaft, loss of life resulted, which necessarily induced prompt examination thereafter.

We hold that it was within the power of the legislature to provide for the inspection of mines by inspectors so appointed, and to provide for fees to be paid by the mine owner to be used towards the payment of the expenses of such inspection. Such fee is in no sense a tax, but a mere compensation for services rendered, and the act is therefore not unconstitutional.

It was not error to refuse to hold the propositions asked by the appellant, and the judgment of the circuit court of Sangamon county is affirmed.

*Judgment affirmed.*

WALTER F. WYMAN

v.

THE FORT DEARBORN NATIONAL BANK *et al.*

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*Opinion filed October 16, 1899.*

1. **BANKS**—right of bank to apply correspondent's deposit to payment of latter's debt. A bank may, in good faith, apply a deposit account of a correspondent bank to the payment of a certificate of deposit issued by the latter, which is in effect a demand note due to the former, although the latter has drawn a check against the deposit which has not yet been presented or any notice thereof given to the drawee bank.

2. **SUBROGATION**—when payee of check is entitled to share in fund arising from drawee's sale of drawer's collateral. The holder of a check drawn by one bank upon another with which it has a deposit, is entitled, upon the application of the deposit by the drawee, without notice of the check, to the payment *pro tanto* of an obligation due to it from the drawer and secured by collaterals, to be subrogated, as against the drawer or its receiver, to the fund arising from the collateral securities and remaining after payment in full of the demand of the drawee.

3. **EQUITY**—when relief may be had under bill to marshal securities. Upon delivery of a check drawn by a bank upon its correspondent the payee acquires an interest in the drawer's deposit in the drawee bank, which entitles him to relief by bill to marshal securities, where, before presentment of his check, the drawee bank has applied the deposit upon its demand note against the drawer, which was also secured by collateral.

*Fort Dearborn Nat. Bank v. Wyman*, 80 Ill. App. 150, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

On September 1, 1896, the First National Bank of Helena, Montana, drew its check upon the Fort Dearborn National Bank of Chicago for \$10,000, in favor of appellant. At the time this check was given the Fort Dearborn National Bank had in its possession, on deposit to the credit of the First National Bank of Helena, \$20,523.67.

The Fort Dearborn National Bank at the same time held a certificate of deposit of date May 15, 1895, from the First National Bank of Helena, in the sum of \$25,000, which latter was secured by collateral for the face amount of \$30,000 of notes taken by the First National Bank of Helena and endorsed to the Fort Dearborn National Bank. The Helena bank was indebted to the Fort Dearborn National Bank, on account, \$649.89. On the 4th day of September, 1896, the Helena bank was placed in the hands of a receiver, and on the same day the Fort Dearborn National Bank transferred the account on deposit with it to the amount of \$20,523.67 to itself, and credited its certificate of deposit with that amount, debiting the Helena bank with the same sum, and leaving a balance due the Fort Dearborn National Bank of \$2321.39, with interest thereon. On the 5th day of September the check drawn in favor of appellant was presented for payment to the Fort Dearborn National Bank, which was refused. On the 21st day of January, 1897, the appellant filed in the superior court of Cook county his bill, making the Fort Dearborn National Bank and the receiver of the Helena bank defendants, and sought to marshal assets. To this bill of complaint a demurrer was interposed, and overruled. Subsequently the defendants to the bill filed an answer, and the cause was submitted upon bill and answer, and a decree was entered in accordance with the prayer of the bill, to reverse which the defendants sued out a writ of error to the Appellate Court for the First District, where the decree was reversed and the cause remanded with directions to dismiss the bill, whereupon the appellee in the Appellate Court prosecuted this appeal.

PECKHAM, BROWN & PACKARD, for appellant:

By the execution and delivery of its check on a deposit account of bankable funds in the Fort Dearborn bank sufficient in amount to meet it, the First National Bank of Helena assigned and transferred *pro tanto* to the

payee that deposit account. *Bank v. Banking Co.* 114 Ill. 483; *Abt v. Bank*, 159 id. 467; *Hotel Co. v. Bank*, 171 id. 531.

The Fort Dearborn bank being a creditor of the Helena bank, and having not only this "fund" upon deposit but also a "fund" of collateral securities in its possession, to each and both of which funds it could resort for the satisfaction of its claim against said Helena bank, had "an interest" in each of these two funds: Under these circumstances equity would compel the Fort Dearborn bank, having recourse on these two funds, to exhaust the one on which it alone had a claim, in order that the other, in which alone the payee had an interest, should go as far as possible to the satisfaction of his claim upon it, provided, always, that the Fort Dearborn bank should not be injured in its security nor materially delayed or inconvenienced in the collection of its debt. Upon this theory the bill in this case was framed and upon this theory the decree was entered, and it presents a plainly proper case of the marshaling of assets. 2 Beach on Modern Eq. Jur. sec. 784; 1 Story's Eq. Jur. secs. 635, 636; *Aldrich v. Cooper*, 2 White & Tudor's L. C. in Eq. 82; 27 Am. Law Reg. 739; 14 Am. & Eng. Ency. of Law, "Marshaling Assets;" *James v. Hubbard*, 1 Paige's Ch. 228; *Milmine v. Bass*, 29 Fed. Rep. 632; *Ingalls v. Morgan*, 10 N. Y. 178; *Clowes v. Dickinson*, 5 Johns. Ch. 235; 9 Cow. 240; *Campbell v. Carter*, 14 Ill. 286; *Young v. Morgan*, 89 id. 200.

**GILBERT & FELL, for appellees:**

In order to authorize marshaling of securities the party seeking the relief must have an existing lien on or interest in a fund which is subject, in common with another fund, to a paramount liability. 1 Story's Eq. Jur. sec. 633.

The doctrine of marshaling securities will not be applied where it will operate to the prejudice of the party entitled to the double fund. *Heidelbach v. Fenton*, 79 Ill. App. 357.

The payee of a check or draft acquires no interest in the funds in the drawee bank before notice is given to the latter of the drawing and delivery of the check or draft, and the manner of giving this notice must be by presentation of the check or draft to the bank for payment. *Munn v. Burch*, 25 Ill. 21; *Greenebaum v. Bank*, 70 Ill. App. 407; *Rouse v. Calvin*, 76 id. 362; *Myers v. Bank*, 27 id. 254; *Pabst Brewing Co. v. Reeves*, 42 id. 154; *Niblack v. Bank*, 169 Ill. 517; *Gage Hotel Co. v. Bank*, 171 id. 531; *Bank v. Jones*, 137 id. 684; *Fourth Nat. Bank v. City Nat. Bank*, 68 id. 398; *Northern Trust Co. v. Rogers*, 60 Minn. 208; *Laclede Bank v. Schuler*, 120 U. S. 511; Morse on Banks and Banking, (3d ed.) sec. 505; Daniel on Neg. Inst. (4th ed.) secs. 1638, 1643, 1644.

Where a bank holds a demand note, or a note past due, it has the right to charge such obligation up against the maker's deposit account; and if it does so before a check or draft drawn by the depositor is presented, it will be entitled to hold the deposit against any check or draft afterwards presented. *Niblack v. Bank*, 169 Ill. 517; *Myers v. Bank*, 27 Ill. App. 254; *Bank v. Kelsay*, 54 id. 660.

The certificate of deposit involved in this case is, in effect, a demand promissory note. *Hunt v. Divine*, 37 Ill. 137; *Tripp v. Curtenius*, 36 Mich. 494.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

It is insisted by the appellant that by the execution and delivery of its check for \$10,000 against the deposit account of the Fort Dearborn National Bank, the First National Bank of Helena assigned and transferred to the appellant, from that deposit account, an amount sufficient to pay the check on September 1, 1896, the time at which it was drawn, and as sustaining this contention appellant cites *National Bank of America v. Indiana Banking Co.* 114 Ill. 483, *Abt v. American Trust and Savings Bank*, 159 id. 467, and *Gage Hotel Co. v. Union Nat. Bank*, 171 id. 531.

The principle is clearly established by the foregoing and other authorities in this State, that the check of a depositor upon his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for, and the banker becomes the holder of the money for the use of the holder of the check, and is bound to account to him for the amount thereof, provided the party drawing the check has funds to that amount on deposit, subject to his check, at the time the same is presented. (*Munn v. Burch*, 25 Ill. 21.) The check operates as an absolute assignment of the fund on which it is drawn, from the time it is delivered, as between the drawer and the payee, and the bank is bound as soon as the check is presented, and whatever sum stands upon the books to the credit of the depositor at the time of such presentation is absolutely assigned to the holder of the check. (*Bickford v. First Nat. Bank of Chicago*, 42 Ill. 238; *Brown v. Leckie*, 43 id. 497; *Fourth Nat. Bank v. City Nat. Bank*, 68 id. 398; *Union Nat. Bank v. Oceana County Bank*, 80 id. 212; *Metropolitan Nat. Bank of Chicago v. Jones*, 137 id. 634; *Niblack v. Park Nat. Bank*, 169 id. 517.) And the relation existing between the drawer, the check-holder and the banker becomes such, when there are sufficient funds on deposit to meet the check at the time of presentation, that, because such funds were appropriated at the time of the drawing of the check, the contract to be implied between the depositor, the banker and the check-holder is, that the check-holder, whoever he may be, may have his action and recover against the bank the amount, *pro tanto*, of the check. (*Gage Hotel Co. v. Union Nat. Bank, supra*.) In the latter case it was said (p. 536): "If the funds are in the bank when the check is drawn, the drawing is an appropriation, as between the drawer and the payee, of the sum of money named in the check, which is to lie in the bank until called for by a presentation of the check. It is true that in such a case there is no privity between the bank and the check-holder until presentment,

and that priority in drawing a check does not give priority of right to the fund as against the banker, but that such priority of right is determined by the order of presentation." It was held in *Niblack v. Park Nat. Bank of Chicago, supra* (p. 521): "It is also the law, where a bank holds a demand note, or a note past due, it has the right to charge such obligation up against the maker's deposit account, and if it does so before a check drawn by the depositor is presented for payment, it will be entitled to hold the deposit against any check afterwards presented."

In this case, on the 4th of September,—at least one day before the presentment of the check for payment,—the Chicago bank transferred the account, and by proper entries on its books credited the Helena bank with all the money held by it to the credit of the latter bank, which credit was made on a certificate of deposit, which was, in effect, a demand note. (*Hunt v. Devine*, 87 Ill. 137; *Tripp v. Curtenius*, 36 Mich. 494.) Appropriating the deposit fund in good faith, in pursuance of strict legal rights, for the purpose of protecting its own interests, and without notice of the appropriation of the money by drawing the check in favor of appellant, was not a wrongful act but one authorized by law, and absolutely transferred the legal and equitable right to the fund so deposited to the Fort Dearborn National Bank, the check not having been presented to it nor it having any notice of the same until the day after the transfer of the account. Under the recognized rule in this State there was between the Helena bank and the payee of the check an absolute assignment of \$10,000 then on deposit with the Fort Dearborn National Bank, and no right existed in the Helena bank to change that deposit in any way or to so draw against it as to prevent the assignment, *pro tanto*, from being carried out. It is clear, the holder of the check had an interest in the fund so assigned, whilst it is equally clear that until the bank had notice it could pay subsequently drawn checks, or credit the amount of the deposit on any over-

due paper of its own. The equitable interest of the check-holder, however, remained the same.

It is a principle controlling the marshaling of securities, that where one creditor can resort to two funds and another to one of them only, the former must seek satisfaction out of that fund which the latter cannot touch. In Pomeroy on Equitable Jurisprudence (sec. 1414) it is said: "If, therefore, the prior creditor resorts to the doubly charged fund, the subsequent creditor will be substituted, as far as possible, to his rights. These rules must be taken with the modifications and exceptions that in their application the paramount encumbrancer shall not be delayed or inconvenienced in the collection of his debt, \* \* \* that the rights of third parties shall not be prejudiced, and that the parties themselves are creditors of the same debtor." Numerous authorities are there cited as sustaining these propositions.

The principle of marshaling securities has been frequently applied to cases where there is an equitable interest or lien on collateral securities. In Colebrooke on Collateral Securities it is said (sec. 98): "By this rule, a creditor having a lien upon two funds for the payment of his debt and a subsequent creditor a lien upon one, only, of such funds, the former is required to exhaust his remedy against the fund which is especially for his security before resorting to that in which the subsequent creditor is interested. The rule, however, is never enforced in cases where it would cause an injury or damage to the creditor holding such liens upon separate funds or would work injustice to other parties. The rule was applied where a merchant had forwarded his note to a broker for sale, and the proceeds, less commissions, remitted. The broker fraudulently pledged the note, with other collaterals, to a bank to secure a loan to himself, of which the merchant received nothing. The merchant, learning of the misappropriation, gave notice to the bank and claimed to be subrogated to any surplus arising from

other securities held by it after the payment of the loan. Subsequently, and before the maturity of the loan, the note fell due and was paid without suit. Upon realizing the other securities the bank held a surplus in its hands. The merchant was entitled to be paid from such surplus, his voluntary payment not affecting his right of recovery."

This principle is sustained by *Farwell v. Importers' Nat. Bank*, 90 N. Y. 483. In that case the merchant had an equitable interest in collaterals, which, with his note, were put up to secure the loan to the broker by reason of the broker's misappropriation of the note, and is not equitably a stronger case for the marshaling of assets than where, as in this case, the bank had as security for its certificate of deposit and for its account due, notes aggregating about \$30,000 and a deposit of over \$20,000. Here, \$10,000 of the amount deposited having been equitably assigned to the complainant, by reason of its appropriation by the bank before receiving notice of the drawing of the check the complainant was deprived of all interest in the deposit, and the Helena bank, or its receiver, who could have no greater interest than the bank itself, received the benefit of the application of the deposit by the Fort Dearborn National Bank on its certificate of deposit, and the complainant, as holder of the check, had such an interest in the sum deposited that he should be subrogated, as against the Helena bank or its receiver, to the notes held by the Fort Dearborn National Bank after the payment of the residue due the latter bank; and this principle of subrogation is applicable because, by reason of the appropriation of the fund by the bank with which the deposit was made, to the payment of a debt for which it held two distinct character of securities, one of those securities is, to an extent sufficient to pay the complainant, released from liability so far as the Fort Dearborn National Bank was concerned, and the latter bank had lawfully used \$10,000 of a deposit there-

tofore assigned to the complainant by the Helena bank. 2 Beach on Modern Eq. Jur. sec. 784; 1 Story's Eq. Jur. secs. 635, 636.

It is a maxim of equity that "equity regards and treats that as done which in good conscience ought to be done," and in writing of this maxim Mr. Pomeroy, in his work on Equity Jurisprudence, (sec. 365,) says: "The principle involves the notion of an equitable obligation existing from some cause; of a present relation of equitable right and duty subsisting between two parties; a right held by one party, from whatever cause arising, that the other should do some act, and the corresponding duty,—the *ought*,—resting upon the latter to do such act. Equity does not regard and treat as done what might be done or what could be done, but only what ought to be done. Nor does the principle operate in favor of every person, no matter what may be his situation and relations, but only in favor of him who holds the equitable right to have the act performed, as against the one upon whom the duty of such performance has devolved." A court of equity acting upon this fundamental principle may go beneath the appearance of things and deal with the real facts, where the interest is a purely equitable one, recognized by courts of equity alone. When, therefore, a prior encumbrancer of two funds, by his election of remedies, deprives a junior encumbrancer who has a lien upon one of the funds only, from reaching the particular fund on which he has a lien, the junior encumbrancer, to the extent of his lien, should be substituted to the lien of the paramount encumbrancer upon the other fund bound, as against the debtor and all claiming under him by lien or title subsequent in time. (*Gibson v. Seagrim*, 20 Beav. 614; *James v. Hubbard*, 1 Paige's Ch. 228; *Clowes v. Dickinson*, 5 Johns. Ch. 235.) Under a bill for marshaling securities, relief may be had in that character of case. The Fort Dearborn National Bank had a right to apply the deposit in payment of the indebtedness *pro tanto* to the extent of

the deposit, and deprive the check-holder of any part of that deposit as a fund assigned to him, but he had such an equitable interest in that fund by reason of its assignment by the check, that he is entitled to be subrogated to the extent of his check, with interest thereon from the time it was presented, to the fund to be derived from the collection or sale of the collateral securities held by the Fort Dearborn National Bank as security on its certificate of deposit and bank account, after the residue is paid to it.

The superior court erred in decreeing that the Fort Dearborn National Bank should deliver to the receiver of the First National Bank of Helena the collateral notes, but did not err in decreeing that from the proceeds of the same there should first be paid to the Fort Dearborn National Bank the amount, including interest, due it, and to pay to Wyman the amount due on said check and interest, and to retain the balance as part of the assets of the First National Bank of Helena; nor was there error in the decree of the superior court in directing if there was not enough to pay Wyman in full, the amount unpaid should be allowed as a claim against said First National Bank of Helena, to be paid in due course of administration of its assets, and that the receiver pay the costs. It was error in the Appellate Court for the First District to reverse the entire decree of the superior court and remand the cause, with directions to dismiss the bill.

So far as the superior court decreed that the Fort Dearborn National Bank deliver to the receiver of the First National Bank of Helena the collateral notes, its decree is reversed, but in all other respects the decree of said court is affirmed. For the error of the Appellate Court for the First District in reversing the entire case and remanding with directions to dismiss the bill, its decree is reversed and the cause is remanded.

*Reversed and remanded.*

THE PENNSYLVANIA COMPANY *et al.*

v.

THE CITY OF CHICAGO *et al.*

*Opinion filed October 16, 1899.*

1. **STREETS AND ALLEYS**—*city cannot grant exclusive use of street for private purposes.* A city has no power or authority to grant the exclusive use of its streets to any private person or for any private purposes, but must hold and control them exclusively for public use.

2. **SAME**—*city may establish hack stands in front of railroad depots.* Railroad depots in cities are in the nature of public buildings, and the city council may establish hack stands in front of them so long as access to or egress from the building is not prejudicially interfered with. (CARTWRIGHT, C. J., dissenting.)

3. **SAME**—*railroad company cannot grant special privileges in street beyond limits of its grounds.* A railroad company in control of depot grounds and buildings cannot grant special privileges in the street beyond the limits of its own land, whereby one person is given, to the exclusion of others, the right to carry passengers from its depot beyond its own lines.

4. **INJUNCTION**—*private owner cannot enjoin use of street given by municipal authorities.* The use of a street, with the consent or acquiescence of the municipal authorities, cannot be enjoined at the suit of an abutting owner, nor can he invoke the remedy of injunction for the protection of the public and under that guise seek to protect himself. (CARTWRIGHT, C. J., dissenting.)

5. **SAME**—*injunction will not lie where adequate remedy at law exists.* The remedy of one whose property is damaged by the establishment of a hack stand in front of it under the provisions of a municipal ordinance is by action at law for damages to be determined by the jury, without resort to the remedy by injunction. (CARTWRIGHT, C. J., dissenting.)

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

LOESCH BROS. & HOWELL, and J. J. BROOKS, for plaintiffs in error:

The municipality, in respect of its streets, is a trustee for the general public, and holds them for the use to which they are dedicated. The fundamental idea of a street is,

not only that it is public, but that it is public in all its parts, for free and unobstructed passage thereon by all persons desiring to use it. *Smith v. McDowell*, 148 Ill. 51.

While it is true that the public must submit to all reasonable inconveniences in the highways, yet the highways are created for the public and abutting owners, and they have an unquestionable right to require a reasonable use by all who are entitled to use them. *Lockwood v. Railroad Co.* 122 Mo. 86.

It matters not that a permanent structure for private enjoyment in a street or highway is confined to a part little used or not used at all. It becomes a nuisance as an encroachment upon the public right. *Laing v. Mayor*, 86 Ga. 756.

It is no answer to the charge of a nuisance, that even with the obstruction in the highway there is still room for two or more wagons to pass, or that the obstruction itself is not a fixture. If it be permanently or even habitually in the highway it is a nuisance. The highway may be a convenient place for the owner of carriages to keep them in, but the law, looking to the convenience of the greater number, prohibits any such use of public streets. *Cohen v. Mayor*, 113 N. Y. 532.

“Irreparable injury,” as used in the law of injunctions, does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great; and the fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the best reason why a court of equity should interfere in a case where the nuisance is a continuous one. *Newell v. Sass*, 142 Ill. 104.

STEDMAN & SOELKE, CHARLES S. THORNTON, Corporation Counsel, and J. R. CARRIGAN, for defendants in error:

The use of a street or highway with the consent or acquiescence of the municipal authorities cannot be en-

joined at the suit of an abutting owner. *Doane v. Railroad Co.* 165 Ill. 510; *Murphy v. Chicago*, 29 id. 279; *Patterson v. Railroad Co.* 75 id. 588; *Stetson v. Railroad Co.* id. 74; *Railroad Co. v. McGinnis*, 79 id. 269; *Railroad Co. v. Schertz*, 84 id. 135; *Insurance Co. v. Hess*, 141 id. 35; *Corcoran v. Railroad Co.* 149 id. 291; *White v. Railroad Co.* 154 id. 620; *Railroad Co. v. Bachus*, 154 U. S. 421; *Truesdale v. Grape Sugar Co.* 101 Ill. 561; *Dunning v. Aurora*, 40 id. 480; *World's Columbian Exposition v. United States*, 56 Fed. Rep. 654; *White v. Railroad Co.* 154 Ill. 626; *Bliss v. Kennedy*, 43 id. 67; *County of Cook v. Railroad Co.* 119 id. 218; *Chicago v. Building Ass.* 102 id. 380; *Tibbetts v. Railway Co.* 54 Ill. App. 108; *Union Coal Co. v. LaSalle*, 136 Ill. 119; *Miller v. Webster*, 62 N. W. Rep. 648; *Clark v. Donaldson*, 104 Ill. 639; *Hesing v. Scott*, 107 id. 600.

The law above cited applies to a corporation as well as to a private individual. *Railroad Co. v. Railroad Co.* 66 Ill. App. 362.

Where the relief prayed for, if granted, would be of great injury to the defendants and not a corresponding benefit to the complainants, an injunction will be denied. *Pratt v. Railroad Co.* 35 N. Y. Supp. 557; *Gray v. Railroad Co.* 128 N. Y. 509; *High on Injunctions*, 596; *H. & H. Co. v. Pasdell*, 5 Del. Ch. 435; *Fernes v. Railroad Co.* 121 N. Y. 505; *Railroad Co. v. Adams*, 28 Fla. 656; *Ammernan v. Dean*, 132 N. Y. 355; *Inter-State Commerce Co. v. Railroad Co.* 64 Fed. Rep. 981; *Nason v. Sanburn*, 45 N. H. 171.

No railroad depot company can make arbitrary rules discriminating as to who may occupy stands as provided by such company, and as to who shall solicit passengers therefrom. *Ray on Passenger Carriers*, secs. 113-115; *Railway Co. v. Langlois*, 8 L. R. A. 753, and note; *Markham v. Brown*, 8 N. H. 523; *Craven v. Rogers*, 42 Am. & Eng. Ry. Cas. 656; *Railroad Co. v. Tripp*, 142 Mass. 48; *Express Co. v. Railroad Co.* 57 Me. 188; *Kalamazoo H. & B. Co. v. Sootsma*, 84 Mich. 194; *Mariott v. Railroad Co.* 1 C. B. (N. S.) 499; *Camblus v. Railway Co.* 9 Phil. 411; *Summitt v. State*, 8 Lea, 413.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

The Pittsburg, Ft. Wayne and Chicago Railway Company, one of the plaintiffs in error, is the owner, and the Pennsylvania Company, the other plaintiff in error, is the lessee, of the tract of land occupied by the Union Passenger Station in Chicago, bounded by Madison, Van-Buren and Canal streets and the Chicago river. Several railway companies use this station under an agreement which provides that the Pennsylvania Company shall have control of the station and property. It is alleged that passenger trains to the number of 233 arrive and depart from the station every twenty-four hours; that the average daily number of passengers arriving and departing is over 31,000; that the pieces of baggage received and delivered daily number over 2900, and the United States mail received and delivered averages 178 tons per day. The passenger station fronts on Canal street, and the entire length of the building on that street is 1070 feet, with thirty entrances in constant use in the transaction of business. There are five other stations at different places in Chicago. All tickets beyond the terminus at Chicago, and known as "through tickets," have attached thereto a coupon for conveyance through the city of Chicago from this station to the station of the connecting line of railway, and each railway company entering the station has a contract for the use of a line of coaches for the performance of this service called for by the coupon. All coaches and wagons leaving the railway station perform this service of carrying passengers and baggage, and stand in front of the station as long as necessary to receive passengers, baggage and mail.

On December 31, 1885, the city council of the city of Chicago passed an ordinance establishing stands, which was approved by the mayor, and which provided that "any duly licensed hackney coach, cab or other vehicle for the conveyance of passengers may stand, while wait-

ing for employment, at any of the following places and for the period of time hereinafter provided: Stand No. 1.—The north side of Washington street, between Clark and LaSalle streets. Stand No. 2.—That portion of the west side of Clark street beginning fifty feet from the south-west corner of Randolph and Clark streets and running thence to Washington street. Stand No. 3.—The east side of LaSalle street, between Washington and Randolph streets. Stand No. 4.—The east side of Canal street, occupying one hundred and ten feet, between Adams and Madison streets, as the superintendent of police shall direct. Stand No. 5.—All theatres and other places of public amusement fifteen minutes before the conclusion of the performance. Stand No. 6.—At all railroad depots ten minutes previous to the arrival of all passenger trains. Stand No. 7.—On all such street corners from ten P. M. until sunrise, as the superintendent of police shall designate. Stand No. 8.—At such other places where the occupants of the premises in front of which it is desired to stand for employment shall give permission, in writing, to the owner or driver so to do, and it shall be approved in writing by the superintendent of police: *Provided*, it shall not be lawful to stand for employment in front of a hotel where such stand has been established on the opposite side of the street from such hotel."

On January 20, 1896, the city council passed another ordinance, as follows: "That when, at or near any railway passenger depot in the city of Chicago, a place has been or shall be designated as a licensed carriage stand, it shall be lawful for the driver of the first double and first single vehicle in line to stand in front of such railroad depot and solicit business, provided such driver shall not, in so soliciting business, obstruct the sidewalk or stand thereon at a greater distance than two feet from the curb line."

Hack stands Nos. 1, 2 and 3 are in front of public property. Hack stand No. 4 is in front of the railroad

station. Plaintiffs in error allege in their bill that since the passage of the ordinance this stand in front of the station has had hacks, cabs and express wagons standing continuously, against the protest of the complainants, in front of the station for a distance of about three hundred feet from the south side of Madison street, and that they occupy this stand continuously from seven o'clock A. M. until ten o'clock P. M., and the drivers occupy a part of the sidewalk, soliciting passengers and baggage. It is averred that fifteen hacks and coupés and six express wagons, and from eighteen to twenty men, are at this hack stand continuously during the hours named; that twenty-three to twenty-five horses are fed daily at the stand, and that the drivers of the first single and first double vehicles have stood in front of the main entrance of the passenger station soliciting business.

On February 24, 1896, the plaintiffs in error filed their bill alleging the foregoing facts, and charged that the space in front of the station is necessary for the transaction of the business to which the station is devoted; that said ordinances are illegal and void; that the interference, interruption and daily damage and inconvenience to complainants and occupants of the station constitute irreparable damage; that the hack stand prevents ingress and egress to and from their property, and that its establishment is a damage and interference with their private rights, and causes an unjust burden upon their property without compensation, and gives for a private use a portion of Canal street in front of their property which is held in trust by the city of Chicago solely for use as a public street. The city of Chicago and John J. Badenoch, superintendent, were made defendants, and the bill prayed for an injunction restraining them from continuing the stand for hacks and express wagons, and from permitting the drivers of first single and first double vehicles to occupy the sidewalk in front of the station for the purpose of soliciting passengers.

On leave granted for that purpose, Thomas J. Doyle and Walter Owen, representing the hackmen occupying this stand, were admitted to the suit and filed answers denying that the ordinances are illegal; or that the hack stand prevents complainants from the use of, or ingress to and egress from, their property; or that the space in front of the station is necessary for the transaction of the business of the station, or that the portion occupied by the hack stand is necessary or important for such business; alleging that along the entire space occupied there is no public traffic which is interfered with or damaged by the hack stand, and that on the station grounds and premises of the complainants, and at the entrance to the power house, are stationed hacks and cabs belonging to another proprietor, which wait there for passengers by an arrangement with the complainants.

No answer was filed by the city of Chicago, but it appeared by its corporate counsel. Replications were filed to the answers of Doyle and Owen, and on the hearing, by agreement, the application for injunction was made a final hearing, and affidavits were filed in support of the bill and answers. On hearing the circuit court found that the ordinance passed by the city of Chicago on the twentieth day of January, 1896, and which went into force on the twenty-eighth day of January, 1896, entitled "An ordinance regulating the drivers of vehicles at railroad depots," was illegal, null and void, and the enforcement thereof should be restrained, as prayed in complainants' bill of complaint. The court further found that the ordinance passed by the common council of the city of Chicago on the thirty-first day of December, 1885, entitled "An ordinance establishing hack stands," published as section 1705 in the laws and ordinances of the city of Chicago published in 1890, is a valid ordinance so far as it establishes stand No. 4, upon the east side of Canal street, occupying one hundred and ten feet between Madison and Adams streets as the superintendent of police

shall direct, and that said ordinance is a reasonable and valid exercise of the powers conferred upon the common council of the city of Chicago to the extent of the frontage of one hundred and ten feet named in said ordinance.

The title of the streets is vested in the city, and it has the conservation, control, management and supervision of such trust property, and it is its duty to defend and protect the title to such trust estate. The city has no power or authority to grant the exclusive use of its streets to any private person or for any private purposes, but must hold and control the possession exclusively for public use, for purposes of travel and the like. (*Field v. Barning*, 149 Ill. 556; *Hibbard & Co. v. City of Chicago*, 173 id. 91; *Barrows v. City of Sycamore*, 150 id. 588; *Ligare v. City of Chicago*, 139 id. 46.) The rule is, that all public highways, from side to side and from end to end, are held for the use of the public, and no other safe rule can be adopted. It does not follow, however, that every obstruction of a street would constitute a purpresture or be illegal. Necessary and temporary obstructions of the streets for the purposes of or incident to their repair, and interruptions caused by the improvement of adjoining lots if not continued for an unreasonable time, are not such encroachments as would amount to a public nuisance. The construction of street railroads, the erection of telegraph and telephone poles and the running of stage lines are all increased burdens on the streets which may be authorized by the municipality. A stage line running along the street, or cabs to be used by persons desiring that method of locomotion, would have a right to stop and take up and discharge passengers and use the street for such public use, but mere inconvenience to the owner of property by reason of a hack hailed to stop in front of his premises a sufficient period of time for one to mount or alight, would not give such owner the right to resort to a court of equity and have an injunction. The use of the street or highway with the consent or acquiescence of the mu-

nicipal authorities cannot be enjoined at the suit of an abutting property owner. This court has frequently determined this question and held that where an additional use of the street has been granted by the city an injunction will not be granted to restrain such use, as the right to so occupy is a question between one so occupying and the municipality having the control of the streets and charged with the duty of keeping the same free from unlawful obstructions and protect the public. The remedy of an individual—the abutting owner—is in an action for damages for an injury resulting to his property by reason of what is claimed by him to be a use of the street inconsistent with his rights. He cannot, however, be permitted to invoke the remedy by injunction for the protection of the public, and under that guise seek to protect himself. *Murphy v. City of Chicago*, 29 Ill. 279; *Corcoran v. Chicago, Madison and Northern Railroad Co.* 149 id. 291; *Doane v. Lake Street Elevated Railroad Co.* 165 id. 510, and cases cited.

The depot of the complainants, extending over one thousand feet in length, is for the use of its passengers entering therein or departing therefrom over the different lines of railways which receive and discharge passengers therein. A railroad company, whilst in a certain sense a private corporation, is in many other respects a public corporation and amenable to public control, and different from a mere private corporation. Such a corporation is invested with extraordinary powers, under which it may condemn a right of way, and by the exercise of eminent domain take to its own use, on payment of damages (or, rather, of compensation,) found by a jury, the property of others against the will of the owners, and use and exercise control over it for its corporate purposes. Invested with such power it becomes more than a mere private corporation, and in consequence of its vested powers, in every character, it partakes of a public corporation, and is, and always must be, held amenable to public control.

One of the duties discharged by the various railroads entering this depot is the carriage of passengers. From the facts shown by this record, on an average over thirty-one thousand passengers are received and discharged daily at this depot. There are five other depots in the city of Chicago at which passengers arrive and depart. The transfer of passengers from one railroad depot to another, or their transfer to various places in the city which they may be desirous of reaching, renders means of transportation necessary by which passengers so arriving and desiring to depart may have access to the various railroad depots or to other places in the city to which access is desired, and this, in many cases, is most conveniently met on the part of the traveling public by the use of hacks, which, to be of advantage, must be so accessible that unnecessary waste of time and inconvenience in trying to find the same may not result.

Recognizing that the use of this depot for the purposes for which the land was acquired on which this building was erected, and the use of the same by the railroad companies having access thereto, cannot be prejudicially interfered with by any ordinance of the city to the damage of the complainants, the question as to public and private rights is presented. It does not appear that ingress to and egress from complainants' property is prevented in connection with the complainants' building. It does appear that those who control this depot (complainants herein) have permitted other persons to have a lease on certain ground belonging to and connected therewith, on which such persons may stand their cabs and carriages while awaiting passengers thus arriving at said depot.

Taking into consideration the character of buildings such as depots of the railroads in the city, and recognizing their right to exercise the power of eminent domain, it may well be held that such buildings are in the nature of public buildings. It never has been held that the city council may not establish hack stands in front of public

buildings in the city, and no public want of access to such a convenience as hack stands can be greater on the part of the traveling public at any other point than at the depots of the city. A hack stand cannot, of itself, interfere with passenger or freight traffic of a railroad unless it prevents access to or egress from its buildings. In *Doane v. Lake Street Elevated Railroad Co.* *supra*, it was held (p. 519): "The real ground upon which relief by injunction is denied in such cases is, that the use of a street, being within the purposes for which it is laid out, and therefore a proper use, the right to occupy is properly a question between the defendant and the municipality having the control of its streets and charged with the duty of keeping them free from unlawful obstructions, or between the defendant and the public generally, the individual being left to his action for damages for any injury resulting to his property."

It appears from the record that certain property owned by the complainants and adjacent to the depot was leased to one Leroy Eighme for use as a hack stand, and that the lessee, by using the property and excluding others therefrom, would have privileges of access to the depot and of carrying passengers which others would not have. While we recognize that the companies which control the depot grounds and buildings may make needful rules for their regulation, yet they cannot grant special privileges beyond the limits of their own land, and make a contract with one which gives him the right to carry passengers from their depot beyond their own lines and exclude others from such privilege of carriage. If such companies control the transportation of passengers and merchandise beyond their own lines, such power might be exercised solely for their own benefit and not for that of the public. They cannot make a rule under which certain persons are allowed to occupy the streets or control travel and exclude others therefrom, regardless of any wrongdoing or misconduct on the part of the

persons so excluded. An attempt to exercise a power of that character would be unreasonable and unauthorized under the law. *Montana Union Railway Co. v. Langlois*, 8 L. R. A. 752, and authorities cited; *Old Colony Railway Co. v. Tripp*, 142 Mass. 35; *Schmitt v. State*, 8 Lea, 13.

*Kalamazoo Hack and Bus Co. v. Sootsma*, 84 Mich. 194, was a case where a construction company operating a railroad had leased to the plaintiff a piece of land used for depot purposes in the city of Kalamazoo, to be used by it for carriage and hack stand purposes only. Notices of this lease were posted up, and the superintendent of the railroad company also notified others that the property was for the exclusive use of the lessee company. The defendant placed his hack on the ground, and on being notified to leave, refused to do so and remained there until an incoming train, when he procured a passenger and drove away with him, whereupon the hack company sued in trespass. The court say: "The granting of this exclusive privilege to occupy this favored spot of ground, and one theretofore used customarily by all hackmen and busmen, to the plaintiff, was a discrimination against the defendant as well as all other hackmen not in the employ or service of the plaintiff, thus giving to the plaintiff a monopoly of the railroad company's grounds for the standing of hacks and busses and the soliciting of passengers therefor, \* \* \* and is contrary to the provision of the statute that 'all railroad corporations shall grant equal facilities for the transportation of passengers and freight to all persons, companies or corporations.'" The court further say: "This statute evidently does not relate entirely to the mere carriage on cars of the road. To be effective it must be construed to include also not only the receiving of such passengers and freight at its depots, but as well the receiving of them by other persons, companies or corporations at the point upon its road where the carriage ends. The access to its grounds must be free and equal to all,

whether it be to take passage or leave the trains. No railroad company, under this statute, would be permitted to give to one hack or bus company exclusive access to its depots in the carriage of passengers or freight to its trains. Nor can it any more properly give such exclusive or better privilege to such company taking passengers or freight from its trains to be transported from them elsewhere. But, independently of the statute, the plaintiff could not recover in this case. A railroad company can make all needful reasonable rules and regulations concerning the use of its depots and grounds, and can exclude all persons therefrom who have no business with the railroad or passengers going to and coming from the trains or depots, and it probably can prohibit all persons from soliciting passengers there themselves upon its premises, but it cannot arbitrarily admit one common carrier of passengers or freight to its depot or grounds and exclude all others for no other reason than that it is for its own private profit or pleasure. Such rules and regulations must touch and affect all alike. It may determine the distance from its depot or track at which persons soliciting passengers may stand while on its grounds, but this determination must affect and apply to all. To permit a railroad company, upon any charge except of wrong or misconduct on the part of the person excluded, to allow one hackman or line of hacks to occupy a place upon its grounds which is denied to another, or to set apart the most favorable ground, as in this case, to one company and to exclude the others therefrom, would be, in the language of Justice Field in *Railroad Co. v. Tripp*, 147 Mass. 43, 'to enable a railroad corporation largely to control the transportation of passengers and merchandise beyond its own line, and to establish a monopoly not granted by its charter, which might be solely for its own benefit and not for the benefit of the public.'"

*Montana Union Railway Co. v. Langlois*, 9 Mont. 419, was an action for an injunction brought by the railway com-

pany against the defendant, in which the bill, answer and stipulated facts showed that the railroad company had contracted with Lovell Bros., by which contract they were to carry the mail for the railway company from its station to the post-office, in consideration of which they were to have the exclusive use of certain grounds belonging to the complainant, which it had enclosed. The defendant had insisted in driving his wagons and busses onto said lands and leaving them standing on the ground, the exclusive use of which had been granted to said Lovell Bros. The court, on hearing, dissolved the temporary injunction granted, and based their reason for so doing on the ground that to permit the injunction to stand, restraining other cab drivers than Lovell Bros., to whom the exclusive use had been given, from using the depot grounds, would aid in causing a monopoly, destroy just competition and cause thereby a hardship not only on other cab drivers but on the general public. The court cite *Mariott v. London and Southwestern Railway Co.* 1 Com. B. (N. S.) 499, in which case the complainant alleged that he brought passengers to the defendant's railway station and the latter refused him access to the station grounds to deliver his passengers there, while at the same time this privilege was granted to other companies, and upon this showing the injunction was granted.

*McConnell v. Pedigo & Hays*, 92 Ky. 465, was a case in which a contract similar to that in the case last above cited had been entered into between the railroad company and McConnell, by which an exclusive privilege was sought to be given to him in consideration that he would carry the mails for the company. The injunction sought was denied. To the same effect is the recent case of *State v. Reed*, 76 Miss. 211.

The law furnished a full and complete remedy to the complainants for any injury to their property by the creation of a hack stand by the city. The complainants may for any injury sustained have a remedy at law separate

and distinct from the public interests, and have compensation granted for damages sustained, which can be determined and admeasured by a jury, without resort to the extraordinary remedy by injunction. (*Chicago and Western Indiana Railroad Co. v. Ayres*, 106 Ill. 511; *Rigney v. City of Chicago*, 102 id. 64; *Lake Erie and Western Railroad Co. v. Scott*, 132 id. 429; *Doane v. Lake Street Elevated Railroad Co. supra.*) These complainants cannot, in the interest of the public, resort to this remedy, and have shown no special or peculiar injury to their property entitling them to an injunction.

There was no error in the decree of the circuit court and its decree is affirmed.

*Decree affirmed.*

Mr. CHIEF JUSTICE CARTWRIGHT, dissenting:

The occupation of a street as a place for the owners of hacks, carriages and express wagons to keep them in the intervals when they are not employed in the carriage of persons or property and while waiting for such employment, is purely a private use. It is of the same nature as the occupation of premises for a livery stable or stable yard, and in *Rex v. Cross*, 3 Camp. 224, Lord Ellenborough characterized it as making a stable yard of the king's highway. In *Branahan v. Hotel Co.* 39 Ohio St. 333, it was said to be a mere private use, like booths or structures for the use of dealers; and the same doctrine was affirmed in *McCaffrey v. Smith*, 41 Hun, 117. This is not controverted by the counsel in this case nor in the foregoing opinion, but the propositions laid down in the opinion as rules of law which, as I understand, lead to the affirmance of the decree are these: First, all public highways, from side to side and from end to end, situated in the city of Chicago, are held by said city in trust for the use of the general public for the purposes of travel, subject only to such interruption as necessity, accident or the ordinary requirements of business may demand, and the city has no power to appropriate Canal

street to any other purpose than such public use as a street, or to surrender it to any individual or individuals for private uses; second, if any portion of a street so held in trust for the general public for public purposes lies in front of public property, the city may divert such portion from the purpose for which it was established to the private uses of individuals for a hack stand; third, a railroad company is a common carrier of passengers, may acquire property by the exercise of eminent domain and is amenable to public control, therefore its depot buildings are in the nature of public buildings, and a street in front of such buildings may be devoted to private use for a hack stand; fourth, if a railroad company has leased property owned by it and situated near its passenger depot to an owner of hacks for use in his business, then the city may grant the adjacent street to other owners of hacks and express wagons for their private use as a hack stand; fifth, violation of the trust upon which a street is held, by its diversion to the private interests of a hack stand, with the consent or acquiescence of the municipal authorities, cannot be enjoined at the suit of an abutting property owner; sixth, equity will not interfere in such a case, because the law furnishes a full and complete remedy to the abutting owner for an injury to his property by the use of the street as a hack stand, and such owner may have recourse to law and recover damages for the injury sustained.

A large part of the opinion is taken up with the proposition that a railroad company cannot grant the exclusive privilege of going upon its depot grounds to one hackman and exclude other carriers of passengers from like privileges. But that has nothing whatever to do with this controversy, either as matter of fact or question of law. The entrances and exits for passengers are near Adams street. The next street north is Monroe street, and the second street north is Madison street. It appears from the answers and proof that carriages be-

longing to Leroy Eighme are permitted to stand for the service of passengers at the power house next to Madison street, north of the passenger station, on the grounds of the railroad company, and his agents solicit passengers and call the carriages from the entrance by pressing an electric button. The evidence is that he was allowed this privilege and was required to keep neat and clean carriages, with drivers in uniform, and suitable and satisfactory horses for drawing the carriages, and to charge no more than the fare ordinance of the city of Chicago. There is no allegation in the answers, nor any testimony, that complainants attempted to give him any rights on the public street. No relief was asked by the defendants in respect to going upon the station grounds and occupying complainants' premises equally with him, and none could have been granted. So far as the equal rights of hackmen are concerned, the circuit court by its decree, which is affirmed, held the ordinance which permitted them to solicit passengers and ply their business in front of the passenger station to be void, and left the agents of Eighme to solicit passengers and call carriages at that place, while it sent the hackmen to the hack stand between Madison and Monroe streets, about a block distant. With that decree the hackmen were content and did not appeal or assign a cross-error. The authorities cited and quoted from in the opinion to the effect that a railroad company cannot give one hackman exclusive access to its station, and the observations touching public duties, public control and the granting of monopolies and special privileges, do not relate to any question in the case and cannot influence the decision.

As to the propositions of law pertinent to the case, the first, as stated above, is the law and is sustained by the unanimous opinions of all courts. The remaining propositions seem to me to be inconsistent with the first and to be destructive of public and private interests, and I feel compelled to record my dissent.

I cannot see how the public character or public ownership of adjoining property can in any way change the legitimate uses of a public street. I do not see how the conclusion that a street may be diverted to private use for a hack stand follows from the fact that the adjacent property is owned by the public or is used for a State house, court house, public school, public library, engine house or other building that may be devoted to public use. If a street may be perverted from its general uses, as such, because it adjoins public property and be devoted to the private uses of hackmen, it may be occupied for any other sort of business with the public. (*Branahan v. Hotel Co. supra.*) There is no greater public want of access to a hack stand than to stands or booths where articles which the public is accustomed to use are sold, and a city is neither bound nor authorized to furnish premises for either kind of business. In fact, a hack stand does not supply any general public want, but is a convenience to only a very small fraction even of the traveling public. It seems to me absurd to say that because property is owned by the State for a State house, or the county for a court house, or by a school district for a school house, that the city may obstruct the street in front of it and turn it into a market place or a stable yard. So, too, the power of eminent domain may be invoked to acquire property for these public uses and for parks and other public purposes as well as a railroad station, but I cannot see how that has anything to do with the legitimate uses of a street.

The undisputed facts in this case are, that under the ordinance establishing this hack stand an average of fifteen hacks and coupés and an average of six express wagons, with from eighteen to twenty men, occupy the allotted space along the sidewalk in front of complainants' property continuously from 7 A. M. to 10 P. M.; that from twenty-three to twenty-five horses are fed there one or more times daily, and that the standing of so many

horses, and the custom of feeding them there, create a great amount of dirt and filth. This constitutes as much a permanent obstruction as a fish stand, fruit stand, or any other business carried on at the same place would be. It is necessarily an obstruction and interference with the ingress and egress to and from complainants' property, and the fact that there may be enough room left to enable them to transact their business is no justification for it. The same thing might be said of residence property,—that the owner would have room enough left although a hack might stand in front of it continuously. If the owner did not keep a carriage and had no driveway from the lot to the street, it might be said that he had no need for the ingress and egress to and from his property to the street,—and that is the most that can be said here. The owner's right is that his easement shall not be interfered with unlawfully, and to say that an obstruction, such as a row of hacks and express wagons, does not obstruct is a mere solecism. Any permanent obstruction to travel, whether it be little or great, is an encroachment on the public right and constitutes a nuisance, and the city has no right to permit such an obstruction, so as to deprive the public and the adjacent property owners of the use of streets. *Smith v. McDowell*, 148 Ill. 51; *Field v. Barling*, 149 id. 556; *Barrows v. City of Sycamore*, 150 id. 588; *Hibbard v. City of Chicago*, 173 id. 91. A city has no right to obstruct its streets so as to deprive property holders of free access to and from their lots, (*Stack v. City of East St. Louis*, 85 Ill. 377,) nor can it, by ordinance or otherwise, devote them to a private use. This was expressly held in *Field v. Barling, supra*, where the city of Chicago, by an ordinance, attempted to authorize the building of an overhead private passageway across an alley, not obstructing travel, for the benefit of a party in the transaction of his business, and this court said (p. 566): "The fee of the street passed to the city of Chicago, but the city held the fee in trust for the public,

and for no other purpose. While the city had ample power to control, regulate and improve the street in such manner as the demands of the public required, the law conferred no authority on the city to devote the alley to private uses."

In *Rex v. Russell*, 6 East, 427, the defendant was found guilty, upon an indictment for a nuisance, for wrongfully and unlawfully causing and permitting twenty wagons to stand or remain for a long time, viz., ten hours on each day, before his warehouse, situate in a public street and highway, called Southgate street, in London. The court said, in sustaining the conviction (p. 230): "It should be fully understood that the defendant could not legally carry on any part of his business in the public street to the annoyance of the public; that the primary object of the street was for the free passage of the public, and anything which impeded that free passage, without necessity, was a nuisance; that if the nature of the defendant's business was such as to require the loading and unloading of so many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot; but the courts could not be parties to any compromise for his using the street as his own for any part of his business."

In *Rex v. Cross*, *supra*, the defendant was proprietor of a Greenwich stage coach, which came to London twice a day and stood for three-quarters of an hour in the street near Charing Cross station, waiting for passengers where stages were accustomed to stand. Lord Ellenborough, in sustaining a conviction, said: "Every unauthorized obstruction of a highway to the annoyance of the king's subjects is an indictable offense. Upon the evidence given, I think the defendant ought clearly to be found guilty. The king's highway is not to be used as a stable yard. It is immaterial how long the practice may have prevailed, for no length of time will legitimate a

nuisance. A stage coach may set down or take up passengers in the street, this being necessary for public convenience; but it must be done in a reasonable time, and private premises must be procured for the coach to stop in during the interval between the end of one journey and the commencement of another. No one can make a stable yard of the king's highway."

In *Cohen v. Mayor of New York*, 113 N. Y. 532, the city granted a license to a grocer permitting him to keep his delivery wagon standing in front of his store night and day. It was held the wagon constituted a public nuisance, and that for damages resulting therefrom the city was liable. Peckham, J., in delivering the opinion of the court, said: "It is no answer to the charge of a nuisance, that even with the obstruction in the highway there is still room for two or more wagons to pass, nor that the obstruction itself is not a fixture. If it be permanently or even habitually in the highway it is a nuisance. The highway may be a convenient place for the owner of carriages to keep them in, but the law, looking to the convenience of the greater number, prohibits any such use of the public streets. Familiar as the law is on the subject, it is too frequently disregarded or lost sight of. Permits are granted by common councils of cities, or by other bodies in which the power to grant them for such purposes is reposed, and they are granted for purposes in regard to which the body or board assuming to represent the city has no power whatever, and the permit confers no right upon the party who obtains it."

The city of Cincinnati, by ordinance, established a hack stand on the side of Central avenue, in that city, next to the property of the hotel company. In *Branahan v. Hotel Co. supra*, the court sustained a perpetual injunction at the suit of such abutting owner, and said: "This ordinance granted a permanent use of the street for mere private uses. As well might the city authorize permanent booths or structures for the use of dealers in the

various articles of trade. Having no rent to pay, the occupants could accommodate the public at better rates. The supervision and control of the public highways of a city is a public trust, and while additional uses may be imposed, not subversive of or impairing the original use, such as laying down gas and water mains, yet the rights of the public to use it as a street, and of the adjacent lot owner to enjoy it as the means of access to his property, cannot be materially impaired. The city has the right to regulate hackney coaches, and also the right to appropriate private property for the use of the corporation, but it has no power to appropriate the easement of an adjacent owner to a mere private use."

So in *McCaffrey v. Smith*, *supra*, the court enjoined the use of a street in the village of Saratoga, adjoining plaintiff's property, for a hack stand, under the assumed authority of a village ordinance, upon the ground that the village had no authority to pass such ordinance. The court, in holding this ordinance illegal, said: "The public interest in the highway is nothing but an easement, which gives to individuals the right to pass and re-pass on foot or with animals and conveyances, and, as an incident, they may do all acts necessary to keep the highway in proper repair for traveling purposes. Any use of the highway except for the purposes of traveling and the making of necessary repairs under the direction of proper authorities, constitutes a trespass against the adjoining property owner. \* \* \* But the legislature had not the power, neither had the municipal authorities, against the adjoining owner, to confer upon any person the right to make use of the highway for any other purpose than to pass and re-pass, without the consent of the owner of the fee." See, also, 2 Dillon on Mun. Corp. sec. 660; *Commonwealth v. Passmore*, 1 S. & R. 217; *Laing v. Mayor*, 86 Ga. 756; *Lockwood v. Wabash Railroad Co.* 122 Mo. 86; Elliott on Roads and Streets, 478; *Rex v. Jones*, 3 Camp. 230.

These authorities establish that such a use as is here attempted to be made of Canal street is a perversion and violation of the trust on which the city holds the street, and I cannot agree to the holding that such use cannot be enjoined at the suit of complainants, as abutting owners. In the foregoing opinion such a holding is rested on the ground that there is a remedy at law, by an action for damages. In the first place, that question cannot be raised in the case. It was not raised in the circuit court by demurrer, answer, or in any other way. Cases already cited show that the subject is not foreign to equity jurisdiction, which has been freely exercised, and the question not having been raised below cannot be brought into the case here. (*Stout v. Cook*, 41 Ill. 447; *Dodge v. Wright*, 48 id. 382; *Hickey v. Forristal*, 49 id. 255; *Magee v. Magee*, 51 id. 500; *Gridley v. Watson*, 53 id. 186; *Knox County v. Davis*, 63 id. 405; *Ryan v. Duncan*, 88 id. 144; *Clemmer v. Drovers' Nat. Bank*, 157 id. 206.) If the proposition is considered, it is unsound and against the authorities. Mr. High, in his work on Injunctions, (3d ed. sec. 816,) says: "The remedy by injunction is the most efficient means of preventing obstructions to public highways, and where the facts are easy of ascertainment and the rights resulting therefrom are free from doubt, the relief will be granted at the suit of a citizen having an immediate and special interest in the matter, and the owner of a lot abutting upon a street sustains such a special injury, different from that sustained by the public, as to entitle him to maintain an action to restrain the unauthorized obstruction of the street in front of his premises." In 1 Am. & Eng. Ency. of Law, (2d ed.) 225, it is said: "The owner of property abutting on a public highway is entitled, as one of the primary incidents of his ownership, to the right of free ingress and egress. This right exists whether the abutter owns the fee to the center of the street, leaving the public with merely an easement of passage, or whether the title to the entire highway is vested in the latter.

The right is a species of private property, of which the owner may not be deprived without due compensation, and it is a right which he may have enforced by the writ of injunction." In Lewis on Eminent Domain it is said (sec. 114): "The abutting owner has a private right of access to his property over the street which is as inviolable as his property in the lot itself;" and (sec. 637) "the abutting owner may, in general, enjoin any use of the street which is foreign to its purposes as a public highway and is calculated to produce special damages to his property." To the same effect are Hilliard on Injunctions, 273, and Waterman's Eden on Injunctions, sec. 262, note. This court is firmly committed to the same doctrine. *Green v. Oakes*, 17 Ill. 249, was a bill in chancery to enjoin the obstruction of a public road. The answer alleged that the court had no jurisdiction and that complainant had adequate relief at law. This court said (p. 251): "Where the right is clear and appertains to the public, and an individual is directly and injuriously affected by the obstruction of the easement or the creation of the nuisance, they (courts of equity) will interfere, on the application of such individual, to prevent the threatened wrong or invasion of the common right. In such case equity can give complete remedy,—prevent irreparable mischief and that continuous and vexatious litigation that would arise out of resort to the remedies afforded by law,"—citing authorities. That case was referred to and endorsed in *Craig v. People*, 47 Ill. 487. In *Carter v. City of Chicago*, 57 Ill. 283, an abutting owner filed his bill to restrain an abuse of power by the city in establishing a roadway next to his lot line so as to deprive him of a sidewalk, and the jurisdiction of equity was sustained. Although that was a subject on which the city had unquestioned power to act, the action being unjust and oppressive, the lot owner was not left to his remedy at law, which would be inadequate. The court there quoted from *Smith v. Bangs*, 15 Ill. 399, as follows: "So a court of equity has

jurisdiction to interpose by injunction where public officers, under claim of right, are proceeding illegally to impair the rights or injure the property of individuals or corporations or where it is necessary to prevent a multiplicity of suits." In *Field v. Barling, supra*, upon a full discussion and citation of authorities, the right to an injunction was again sustained.

The cases cited in the opinion do not sustain its doctrine. In *Murphy v. City of Chicago*, 29 Ill. 279, Murphy sued the city in an action on the case for damages occasioned by the city allowing a railroad company's track to be laid in Water street and raising the grade of the street, and the court said: "It is the settled law of this court, as well as in most of the other States of this Union, that it is the legitimate use of a street or highway to allow a railroad track to be laid down in it, and for doing so the city is not liable for any damages which may accrue to individuals." In that case it was held that there was no remedy at law against the city, and there was no question about equity. In *Corcoran v. Chicago, Madison and Northern Railroad Co.* 149 Ill. 291, it was held that if the ordinance could be regarded as not attempting to exclude the general public from the use of Archer avenue, but subjecting it to an additional public use, the abutting owner would be remitted to his action at law to recover compensation for the consequential damages resulting to his property. That was not to be an action against the city, which was denied in *Murphy v. City of Chicago* and which no one supposes could be brought, but an action against the person or corporation occupying the street. It was a case of the lawful and legitimate use of the street within powers expressly conferred on the city. In *Doane v. Lake Street Elevated Railway Co.* 165 Ill. 510, the use of the street permitted was for an elevated railway for passenger travel, and the settled law of this State is that such a use is not unlawful. It was there held that such erection, which greatly accommo-

dated the public business, increasing the facilities and safety of transit, did not subject the street to a new servitude or unlawful use. Where such a use of a street as is entirely lawful is granted by the city, an injunction will not be allowed to the abutting property owner, although there may be damage to him, because the use is a proper one. The city having a right to grant such a use, the question whether it has been granted is between it and the one claiming as grantee. A grant to a street railroad is only adding an additional mode of conveyance, and as the abutting property owner holds his land subject to the exercise of that right, necessarily he can not enjoin its exercise. This is a different question, for the use of a street for a back stand is a purely private use. The property owner is not bound to resort to his action at law, as the use granted is of a kind he is not required to submit to. In the case of an attempt to pervert a street to an improper use foreign to the uses of a street, an abutting owner has a right which is entitled to protection in equity.

Where there is a substantial legal right and a threatened wrong to which a party is not bound to submit, the amount of damages which will result from the illegal and wrongful act does not bar relief in equity. In *Field v. Barling, supra*, this question was disposed of, and it was said that irreparable injury does not mean that it must be very great, and the fact that no damage can be proved, so that in an action at law the jury could only award nominal damages, often affords the very best reason why a court of equity should interfere. The question is whether the private use is an encroachment on the street, and if there is a breach of the trust upon which the streets are held by the city, the abutting owner may have relief although the injury may be small.

These cases make it very clear that the remedy of complainants is in equity. If the use is unlawful and foreign to the purposes of a street, the abutting owner

may have an injunction, and if, as assumed in the opinion, the grant of such use is legitimate and within the power of the city, the remedy at law which is offered to the complainants cannot be against the city, but must be against the various hackmen who occupy the hack stand. Not only would the injury not be compensated for in the trifling damages which would be obtained in the numerous suits against each individual hack driver, where the cost and trouble would exceed the recovery if it should ever be collected, but a new action would have to be brought against every subsequent hackman who should place his hack there under color of the city ordinance. To remit an injured property owner to such interminable litigation and a multiplicity of suits for trifling damages in each particular instance would be a mockery of justice.

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THE PEOPLE *ex rel.* Sherman A. Hathorne

*v.*

R. H. MORROW *et al.*

*Opinion filed October 16, 1899.*

MUNICIPAL CORPORATIONS—*an annexation proceeding begun during pendency of village organization is void.* A proceeding for the annexation of territory to a contiguous city under paragraph 195 of the City and Village act (Rev. Stat. 1874, p. 244,) is illegal and void when instituted after the filing of a petition for an election to organize the territory into a village under sections 1 and 6 of article 11 of said act, (Rev. Stat. 1874, p. 242,) and while the latter proceeding is still pending and undetermined.

APPEAL from the Circuit Court of Lake county; the Hon. C. W. UPTON, Judge, presiding.

WILLIAMS, HOLT & WHEELER, for appellant:

The statutory right of annexation to the city of Waukegan was not defeated by preliminary proceedings looking towards the incorporation of the same with other

territory, as the village of North Chicago. The right of annexation is unqualified, and applies to any territory contiguous to a city and not embraced within the limits of another corporation. Rev. Stat. chap. 24, sec. 195.

The act for the incorporation of villages provides that the territory shall become organized after election, and not before. Until that time it is subject to annexation. Rev. Stat. chap. 24, art. 11, secs. 1, 3, 5, 6, 7.

The acts required by the statute to be performed by the county judge in village incorporation proceedings are purely ministerial, and neither legislative nor judicial. *Kamp v. People*, 141 Ill. 9; *Ford v. North DesMoines*, 80 Iowa, 630; *Whittaker v. Venice*, 150 Ill. 195.

If annexation was valid the identity of the village territory was destroyed, and no village organization resulted from the election. Judgment of ouster should have been entered accordingly.

PECK, MILLER & STARR, for appellees:

Between these conflicting proceedings, those which were first duly begun and jurisdiction thereby obtained have the right of way and the right to be carried forward to completion without interruption. *Union Trust Co. v. Railroad Co.* 6 Biss. 197; *Bell v. Ohio, etc. Co.* 1 id. 260; *Bell v. Railroad Co.* 2 id. 390; *Riggs v. Johnson County*, 6 Wall. 166; 1 Abbott's Pr. 223, and cases cited; *Mason v. Piggott*, 11 Ill. 88; *Brooks v. Delaplaine*, 1 Md. Ch. 351; *Vendall v. Harvey*, Nelson, 19; *Brown v. Wallace*, 2 Bland's Ch. 585; 1 Fowler's Exch. Pr. 308; 3 Blackstone's Com. chap. 4, p. 45; *Bullock v. Bullock*, 3 Swanst. 698; Finch's Prec. in Chancery, 546; *Harris v. Dennie*, 3 Pet. 292; *Taylor v. Carryl*, 20 How. 583.

The question of the village organization being duly pending before the voters of the village territory, the carrying through of those proceedings to their completion could not be interfered with or defeated by subsequent conflicting annexation proceedings. *Strosser v. Ft. Wayne*, 100 Ind. 443; *Taylor v. Ft. Wayne*, 47 id. 274; *Mul-*

*liken v. Bloomington*, 72 id. 161; *Indianapolis v. Peterson*, 112 id. 344; *Delphi v. Startzman*, 104 id. 343; *Ice v. State*, 123 id. 590; *State v. Armstrong*, 30 Neb. 493; *District of Sheldon v. Sioux County*, 51 Iowa, 658; *Fulton County v. Railroad Co.* 21 Ill. 338; *People v. County of Tazewell*, 22 id. 147; *Truelson v. Duluth*, 61 Minn. 48; *McBryde v. Montesano*, 34 Pac. Rep. 559; *Streissguth v. Geib*, 69 N. W. Rep. 1097.

The rule *qui prior est tempore potior est jure* applies—priority in time gives superiority in right. 1 Copp's Public Land Laws, 100; Morrison's Mining Rights, (8th ed.) 98; Gould on Waters, (2d ed.) 232, *et seq.*; Walker on Patents, (2d ed.) secs. 316, 318; *Bartlett v. Budd*, 1 Lowell, 223; *Ghen v. Rich*, 8 Fed. Rep. 159; *Johnson v. McIntosh*, 8 Wheat. 572; Wheaton on Int. Law, sec. 166.

The term "jurisdiction," within the meaning of the rule, is not confined to proceedings in courts, but is used and is applicable to political and legislative proceedings and acts. 1 Starr & Curtis, sec. 2, pp. 50, 51; Const. of 1848, art. 1, sec. 1; Const. of 1870, art. 1; Schedule, sec. 4; Rev. Stat. chap. 34, secs. 2, 3; chap. 24, art. 3, sec. 16; art. 5, sec. 10.

The alleged annexation proceedings are void, because the act of 1872, under which said proceedings were begun, is unconstitutional, in that it attempts to delegate to property owners and voters of territory without the city power to enlarge the city's boundaries, and to delegate legislative power to interested private individuals.

Section 2 and half of section 1, and other portions of the act of 1872, have been repealed by the Annexation act of 1889. The imperfect remainder of the act is too incomplete to stand alone, and must be held to be repealed. *State v. Perry County*, 5 Ohio, 507; *Slauson v. Racine*, 13 Wis. 398; *State v. Dousman*, 28 id. 547; *United States v. Reese*, 92 U. S. 214; *Hinze v. People*, 92 Ill. 406; *Cornell v. People*, 107 id. 372; *People v. Cooper*, 83 id. 585; *Chicago v. Insurance Co.* 126 id. 276; *Huddleston v. Francis*, 124 id. 196; *Wayman v. Southard*, 10 Wheat. 1; *Brown v. Maryland*, 12 id. 438.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an information in the nature of a *quo warranto*, filed in the circuit court of Lake county by the State's attorney, on the relation of certain parties, against appellees, to oust them of the franchise of president and trustees of the village of North Chicago, on the ground the village was not legally organized. On issue joined a trial was had before the court without a jury, resulting in a judgment finding the respondents not guilty and holding the village organization valid.

It is stipulated by the parties that on April 18, 1895, appellee R. H. Morrow and forty-two other residents and legal voters residing in the territory claimed to have been organized into said village, petitioned the county judge of the county of Lake to submit the question whether the voters in that territory would organize the same as a village under the act of April 10, 1872, and acts amendatory thereof, and that in pursuance of that petition an election was called for the following 7th day of May, notices of which were duly posted, which election resulted in a vote of ninety-one for and five against the organization, and that thereupon the county judge called an election to be held on the 11th day of June following, the returns of which on the 15th showed the election of respondents to the offices from which it is sought to oust them by this proceeding. It is expressly stipulated that all the proceedings following the petition of April 18 were regular and in conformity with the provisions of the statute authorizing the organization of villages; (Rev. Stat. chap. 24, secs. 1, 6, art. 11; 1 Starr & Curtis,—2d ed.—chap. 24, pars. 185-190;) but it is also agreed that on the 6th of May, 1895, (the day before the election on the question of organizing the village,) the requisite number of legal voters in certain of said territory presented a petition to the city council of the city of Waukegan that such territory be annexed to said city, which petition was on the same day allowed and an ordinance of annexation to that

effect regularly adopted. It is also agreed by the parties in this behalf that said last proceeding was in all things regular and in conformity with the statute providing for the annexation of contiguous territory to any city or incorporated village or town. (Rev. Stat. chap. 24, sec. 195, *supra*.) It is conceded that if this latter proceeding legally took the territory therein described out of that claimed to be organized into the village, the organization must be held invalid.

It is insisted on behalf of respondents below, appellees here, that such annexation proceedings were illegal and void,—first, because they were begun after the filing of the petition for an election to organize the village of North Chicago, and while that proceeding was still pending and undetermined; and second, because there was at the time no law of this State in existence authorizing that proceeding,—that is, authorizing the annexation of contiguous territory to cities and incorporated towns and villages. We regard the second position as without force. There was such a statute, then capable of enforcement. It will not, however, be necessary to further notice that branch of the argument, since upon re-consideration of the case we are of the opinion that the first point is well taken and should be sustained.

As between courts of co-ordinate jurisdiction, the tribunal first acquiring jurisdiction retains it, and is not to be interfered with by another co-ordinate court. The reason of the rule is, that otherwise confusion and conflict would arise. Here, power is given over the same territory to two parties authorized to act,—one a city council or board of trustees, who may attach it to a municipality to which it is adjacent; the other, a majority of the legal voters within its boundary, who may organize it into a village.

In conformity to the foregoing rule is the case of *Taylor v. City of Fort Wayne*, 47 Ind. 274. There the appellee attempted to attach certain territory to the city of Fort

Wayne under the provisions of section 84 of a certain statute of that State providing for the annexation of territory adjacent to cities. Another statute authorized the incorporation of towns on the presentation of a petition to the board of county commissioners, and requiring the latter to require certain proof, and make an order declaring that the territory shall, with the assent of the qualified voters thereof, be incorporated, etc. The appellants sought to prevent the annexation by appellee, averring a compliance with all the requirements of the statute in regard to the incorporation of towns, and showing that they had filed their petition before the county board, who had received it in open session and assumed jurisdiction. The city appeared and resisted the granting of the same, and the board ordered the further consideration of the question postponed until its next regular session. In the decision of the case the court said: "But it is claimed by the appellees that the common council was authorized by the charter to annex the territory, and if it was done in the manner pointed out by the charter, at any time before the town was fully organized, the act of annexation would be valid and the application to the board of commissioners thus defeated. Under section 84, *supra*, the common councils of cities are authorized to annex certain territory to the city. Under the act to organize towns that same territory may become incorporated as a town, and thus become a municipal government, outside and independent of the city, before it is annexed. The General Assembly has authorized both proceedings. As we have seen, after an application has been filed before the commissioners by residents of territory sought to be incorporated, it is the duty of the commissioners to hear the application and make such orders as the evidence introduced and steps taken by the petitioners entitle them to. The proceedings before the board of commissioners give that body jurisdiction over the subject matter, and it cannot be defeated by any act of the

common council. Having acquired jurisdiction it is their duty to retain it and proceed to a final hearing and disposition of the application. (*West v. Morris*, 2 Disney, 415; *Merrill v. Lake*, 16 Ohio, 373, 405.) It is a clear principle of jurisprudence that when there exist two tribunals possessing concurrent and complete jurisdiction of a subject matter, the jurisdiction becomes exclusive in the one before which proceedings are first instituted and which thus acquires jurisdiction of the subject,"—citing authorities.

In *Independent District of Sheldon v. Board of Supervisors of Sioux County*, 51 Iowa, 568, the Supreme Court of that State say: "By the proceedings taken by the plaintiff it had obtained jurisdiction over the disputed territory before any steps were taken to organize Grant. The right to complete this organization as provided by law followed. It could not be ousted of its jurisdiction over the disputed territory by anything done subsequent to the proceedings to organize the plaintiff, unless the attempted organization was abandoned or was not completed within the time required by law."

The only thing that distinguishes these cases from this is, that there the bodies authorized to act exercised judicial functions, though not as courts, whereas under our statutes and decisions neither the county judge in giving notice of an election to organize a village, the city council, nor board of trustees upon a petition for annexation of contiguous territory, acts in any other than a ministerial or legislative capacity, and therefore the rule above cited may be said to not strictly apply. It is, however, under our statute, the imperative duty of the county judge and municipal authorities to act. In fact, they have no discretion or power to determine whether they shall do so, and therefore when, in this case, the county judge performed his duty by receiving the petition and ordering the election, the proceeding to organize was as effectually commenced and pending, to be acted upon by the legal voters, as though he had judicially determined

that such notice should be given. The reason of the rule above laid down applies to a case like this with as much force as though the action of the county judge or city council had been strictly judicial, and we are not disposed to attach any importance to the literal definition of the term "jurisdiction." It may, we think, be properly used in this case as synonymous with power or authority.

At the time the petition for annexation was presented to the city there had been begun and was pending a proceeding by the proper authority to perfect the organization of the village. In other words, the territory was in process of organization into a village. That that proceeding might have resulted in a failure to organize does not, in our judgment, militate against this proposition, and the question therefore is, could the petitioners for annexation defeat that proceeding by subsequently attempting to call into exercise the other power authorized by the statute. It cannot, we think, be presumed that the legislature intended to give citizens and legal voters of certain territory the power to organize a village, and at the same time authorize other parties, by a subsequent proceeding, to defeat that right; and it is clear that to hold otherwise would be to bring into conflict, resulting in confusion, the two opposing powers, or, speaking in a general sense, jurisdictions. Had the petition for annexation been first presented to the city council and its action postponed from time to time, until by a subsequent proceeding the organization of the territory into a village had been perfected, the same question would be presented, and we do not think in that case it could reasonably be held that the power of the city council to carry out the annexation proceeding would be defeated. The question as it arises under our statute and decisions is a new one and not wholly free from difficulty, but we think the foregoing views are sustained by both reason and authority.

The judgment of the circuit court will be affirmed.

*Judgment affirmed.*

## CLARA OVERTOOM, Admx.

v.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY.

Opinion filed October 13, 1899.

1. EVIDENCE—that crossing is in populous part of city is competent in suit for injury. Evidence that the crossing at which the plaintiff's intestate was killed is in a thickly settled and populous part of the city and constantly traveled over by large numbers of people is admissible in support of an allegation that the train which killed the intestate was running at an unreasonable rate of speed.

181	828
92a	221
181	828
94a	280
94a	324

2. SAME—testimony that train was going “fast” is competent. Evidence that the train which ran down the plaintiff's intestate “was going fast” is not incompetent, although the witness is unable to state the speed in miles per hour.

181	828
192	516
96a	18
181	828
108a	204
108a	205

3. SAME—what competent in a suit for damages for death at crossing. Evidence as to the height of a trolley wire at the place where a person was struck and killed by a train which is alleged to have been running at unsafe speed is admissible in an action to recover damages for his death, where there is evidence that he was thrown as high as the trolley wire by the train.

181	828
109a	642
181	828
110a	659
181	828
210	45

4. SAME—witness crossing track shortly ahead of deceased may tell of condition of gates. One who passed over a crossing just before the arrival of trains, by one of which plaintiff's intestate was killed, may testify whether the gates were up or down at the time, as tending, to some extent, to show whether they were up or not when the intestate went upon the crossing.

181	828
212	299

5. SAME—stenographic notes at inquest not competent to contradict witness' testimony. Stenographic notes of the testimony taken by one present at a coroner's inquest are inadmissible to contradict a witness on the trial of an action brought to recover damages for the death of the deceased, since the deposition of such witness, required by section 18 of chapter 31 of the Revised Statutes of 1874 to be preserved by the coroner, is the best evidence.

6. SAME—coroner presumed to have reduced witness' testimony to writing. Compliance by a coroner with section 18 of chapter 31 of the Revised Statutes, requiring the testimony of witnesses to be written out and signed, will be presumed on appeal, in the absence of evidence to the contrary.

7. WITNESSES—when jury cannot disregard testimony of witness on ground of its falsity. The jury are not authorized to disregard the entire testimony of a witness whom they believe to have testified falsely upon some matter, in the absence of a corrupt motive on

his part, and when the erroneous testimony is due to forgetfulness or an honest mistake.

8. **APPEALS AND ERRORS**—when *improper impeachment of testimony will reverse*. The admission of incompetent evidence to contradict a witness who testified that the gates at a railroad crossing were up when the train which killed the plaintiff's intestate passed is prejudicial, where the verdict is for defendant.

*Overtoom v. C. & E. I. R. R. Co.* 80 Ill. App. 515, reversed.

**APPEAL** from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN BARTON PAYNE, Judge, presiding.

CHESTER FIREBAUGH, for appellant.

W. H. LYFORD, and S. A. LYNDE, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

The appellant brought her action against appellee, in the superior court of Cook county, to recover damages for the alleged wrongful killing of her intestate, Adrian Overtoom. There was a verdict and a judgment for the defendant, which judgment has been affirmed by the Appellate Court. The errors alleged by appellant on this her further appeal relate to the admission and exclusion of evidence and to the giving and refusing of instructions.

The evidence disclosed that a few minutes before eight o'clock, about dusk, on the evening of April 20, 1895, Overtoom, while passing over the public crossing of appellee's railroad and Michigan avenue, in Chicago, was killed by one of appellee's trains. The street runs north and south, and is intersected by a side-track and two main tracks of appellee's road running north-west and south-east. Overtoom walked upon the crossing just as a freight train was passing north-westerly on one of the tracks, (which one is left uncertain by the evidence,) and, when about to cross over behind the freight train as it passed, was struck and instantly killed by an engine

drawing a tender and caboose car and running to the south-east on the other track.

The declaration, in its several counts, alleged that Overtoom was using ordinary care for his own safety and that his death was caused by the negligence of the defendant,—that is to say, in some of the counts it was alleged that the street in question was "a much traveled public highway and the crossing in a populous and thickly settled part of the city of Chicago," and that the defendant negligently ran its train over said crossing "at a very unusual and unreasonably fast and unsafe rate of speed," and by reason of such negligence ran its said train against and killed said Overtoom. In other counts it was alleged that the defendant failed to ring a bell or blow a whistle upon its said engine and train before it reached the crossing, as required by the statute; that the defendant failed to keep a proper lookout ahead of its running train, and to keep its said engine and train under proper control, and thereby caused the injury. In others there were additional allegations, in substance, that the defendant had erected at the crossing adjustable gates, which, as was its custom well known to the plaintiff, it let down across the street and sidewalks whenever a train or an engine was about to pass, which gates operated both as a signal of the near approach of trains and also to stop the passage of persons onto the crossing, but that at the time in question the gates were not let down, and the defendant thereby told the plaintiff, in effect, that it was safe to enter upon said crossing, which he did, and thereupon defendant negligently ran its engine and train against and killed him. Other counts were added, one setting up an ordinance of the city of Chicago prohibiting trains from running in that district of the city at a greater rate of speed than thirty miles an hour, and another prohibiting trains from running in any part of the city at a greater rate of speed than ten miles an hour, and alleging that the train in question was running at a speed

prohibited by said ordinances. To all of these counts the defendant pleaded not guilty.

The first error assigned is, that the trial court refused to allow the plaintiff to prove that this crossing was in a thickly settled and populous part of Chicago, and that the street at this crossing was constantly traveled over by large numbers of people. This error is well assigned. The evidence tended to prove the allegations of one or more of the counts, and it should have been admitted. As said in *Elgin, Joliet and Eastern Railway Co. v. Raymond*, 148 Ill. 241: "Whether, independent of the ordinance, the rate of speed was such as, under all the circumstances, constituted negligence, was a question presented under the fourth count, and one which it was the duty of the court to submit to the jury." Independently of any ordinance, it was the duty of the defendant, at common law, to regulate the speed of its trains with proper regard to the public safety, "and a high rate of speed might be perfectly proper at country crossings although it might be considered negligence at a crossing in a populous city." (3 Elliott on Railroads, sec. 1160; *Wabash Railway Co. v. Henks*, 91 Ill. 406; *Chicago and Northwestern Railway Co. v. Dunleavy*, 129 id. 132. See, also, *Chicago, Burlington and Quincy Railroad Co. v. Perkins*, 125 Ill. 127.) The evidence tended to prove a rate of speed ranging, according to the testimony of different witnesses, from twelve to forty miles an hour. The engineer put it at twelve miles. Whether or not the train was running at an "unreasonably fast and unsafe rate of speed," as alleged, depended in a great degree upon the extent and frequency of the use of this crossing by the public. Overtoom, as one of the public, had a right to use this crossing, to go upon and travel over it, and the defendant, being charged with knowledge of the extent of the use of the street by the public and the consequent danger in running its trains over the same at a high and unusual rate of speed, was in duty bound to regulate its speed with due regard to

the safety of those having occasion to use the street, and it was certainly proper to prove the extent of such use in connection with the speed of the train.

While the court permitted certain witnesses to testify to the degree of speed at which the train that struck the plaintiff was running, the testimony of other witnesses for the plaintiff's intestate, that "the train was going very fast," was stricken out. This was error. A witness might know and truthfully say that a train was running fast or slow and yet be unable to state the speed in miles per hour, and such inability would not render his testimony of no value, or incompetent upon the question of speed. *Illinois Central Railroad Co. v. Ashline*, 171 Ill. 313.

Again, the evidence tended to prove that when Overtoom was struck by the engine he was thrown "as high as the trolley wire," but the court refused to allow the plaintiff to prove the height of the trolley wire at that time and place. This ruling, also, was erroneous. The evidence, if admitted, would have tended to prove the issue made on some of the counts of defendant's alleged negligence in running its train at an unsafe rate of speed.

One of the plaintiff's witnesses testified that he passed over the crossing when the freight train was within one hundred and fifty feet, and the train, coming from the opposite direction, was within a quarter of a mile of the crossing, and the court refused to allow the plaintiff to prove by him whether the gates were up or down at the time. This testimony should have been admitted. It was so near to the approach of the trains that, if the gates were then up, it tended to some extent to prove they were up when Overtoom passed to go upon the crossing, and bore upon the question of his alleged contributory negligence, which was perhaps the most serious question in the case.

Edward H. Senniff, who, acting as attorney and stenographer for appellee, took in short-hand notes the testimony of the witnesses at the coroner's inquest and upon

the trial below, was called as a witness on appellee's behalf, testified that his notes were correct, and, against the objection of appellant, was permitted to read to the jury his notes so taken of the testimony of Thomas J. Silverman, a witness for appellant, for the purpose of impeaching Silverman. Silverman had testified on the trial that he was about one hundred yards away and saw the train strike Overtoom, and that he ran to him and helped turn him over; that the gates were open at the time and that the train was running thirty or thirty-five miles an hour; that he did not hear the bell ring or whistle blow; that the freight train made a great deal of noise. The witness Senniff read from his notes to the effect that Silverman testified at the coroner's inquest that the gates were down at the time of the accident. Senniff testified that he remembered, in a general way, what the testimony was, but could not say that he had any independent recollection outside of his notes. The witness did not pretend to testify from memory refreshed by his notes, but read his translation of so much of his notes to the jury as evidence as was called for, the court remarking, on overruling plaintiff's objection, that it was "much better than testifying from memory." It is not necessary in this case to consider whether the notes of testimony taken by one who was present and heard it, and who swears to their correctness, may not in some cases be competent as the best evidence of what that testimony was. (See *Mineral Point Railroad Co. v. Keep*, 22 Ill. 9; *Roth v. Smith*, 54 id. 431; *Iglehart v. Jernegan*, 16 id. 513; *Schoonover v. Myers*, 28 id. 308; *Wilson v. Genseal*, 113 id. 403; *Kankakee and Seneca Railroad Co. v. Horan*, 131 id. 288; *Luetgert v. Volker*, 153 id. 385; *Brown v. Luehrs*, 79 id. 575.) But in *Phares v. Barber*, 61 Ill. 271, this court held that it was not error to exclude a transcript of a stenographic report of a witness' former testimony, offered for the purpose of contradiction. In the case at bar the stenographer's notes, or the transcript of them, were incompetent for

another reason: The testimony of Silverman was taken by the coroner, and, as the statute required it, we will presume it was written out and signed by the witness and filed and preserved in the office of the coroner. (Rev. Stat. chap. 31, sec. 18.) Had his deposition thus taken been produced and Silverman's attention properly directed to it, it could have been used to contradict him. (*Consolidated Ice Machine Co. v. Keifer*, 134 Ill. 481; *United States Life Ins. Co. v. Vocke*, 129 id. 557.) That deposition was the best evidence, and the stenographer's notes were not admissible.

The argument is made, however, and the Appellate Court seems to have decided, that this and other errors in the rulings of the trial court did not affect the question of contributory negligence, but only the question of the negligence of appellee, and that in support of the verdict it must be presumed that the jury found that Overtoom did not exercise ordinary care for his own safety but was guilty of contributory negligence. We are of the opinion that it cannot reasonably be said that the errors complained of did not improperly influence the jury in determining whether or not Overtoom contributed to the injury by his own negligence. The controverted question of fact whether the gates were up or down affected the question of negligence on the part of each of the parties. As said in Beach on Contributory Negligence (3d ed. sec. 452): "In the ultimate determination of the question whether the plaintiff was guilty of negligence two separate inquiries were involved: First, what was ordinary care under the circumstances; and secondly, did the conduct of plaintiff come up to that standard." Manifestly, the circumstances must be shown before the question of contributory negligence or the defendant's negligence can be determined. Whether the gates were up or down was one of such circumstances. If the gates were up and he was thereby induced to believe it was safe to attempt to cross, and did so, his being upon the track at the time he was struck, or his failure to look and observe the

coming train, could not so well be attributed to lack of ordinary care on his part as it might under different circumstances. Silverman had testified that the gates were up, and Senniff's notes were admitted to prove that he, Silverman, had testified before the coroner that they were down, and thus this incompetent evidence clearly affected some of the material facts upon which rested the question of negligence, not only of the defendant, but also of the plaintiff. Indeed, under the facts in this case it can not be said that any of the errors mentioned above were harmless or did not influence the jury in their finding.

The error in allowing the notes of Senniff to be read in evidence was intensified by the following erroneous instruction given at the request of the defendant:

"The jury are instructed that if they believe any witness has testified falsely, then the jury may disregard such witness' testimony, except in so far as it may have been corroborated by other credible evidence in the case which you believe to be true."

A witness may have testified falsely upon some matter inquired about, from forgetfulness or honest mistake, and in such case the jury would not be authorized to disregard his entire testimony, whether corroborated or not. It is the corrupt motive, or the giving of false testimony knowing it to be false, that authorizes a jury to disregard the testimony of a witness and the court to so instruct them. (*Pollard v. People*, 69 Ill. 148; *Pennsylvania Co. v. Conlan*, 101 id. 93; 11 Ency. of Pl. & Pr. 304.) Standing alone, this instruction has other patent defects not necessary here to mention.

The judgment of the Appellate Court and that of the superior court are both reversed, and the cause is remanded to the latter court for further proceedings not inconsistent with what we have here said.

*Reversed and remanded.*

MARY E. TRACY  
v.  
WILLIAM W. BIBLE *et al.*

181 881  
92a 480

*Opinion filed October 16, 1899.*

1. APPEALS AND ERRORS—*order to give bond for costs is a final order where suit is dismissed for non-compliance.* An order of the trial court refusing to allow the complainant to prosecute as a poor person and directing her to give a bond for costs, for failure to comply with which order the bill was dismissed, is a final order, which may be assigned for error.

2. COSTS—*when refusal to permit complainant to prosecute as a poor person is not error.* The court's refusal to allow a complainant to prosecute his action as a poor person, under section 5 of the act on costs, (Rev. Stat. 1874, p. 298,) is not an abuse of discretion, where the affidavit merely alleges that the complainant has no property exempt from execution and is unable to give security for costs.

WRIT OF ERROR to the Circuit Court of McDonough county; the Hon. GEO. W. THOMPSON, Judge, presiding.

H. C. AGNEW, for plaintiff in error.

SHERMAN & TUNNICLIFFS, for defendants in error.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Plaintiff in error brought her bill in the circuit court of McDonough county to contest the will of her father, Josiah Bible, deceased, on the ground of undue influence by defendant in error William W. Bible. He filed an affidavit under section 4 of chapter 33 of the Revised Statutes, upon which he based a motion for a rule against her to give security for costs. The rule being entered requiring her to give a bond or show cause by a day named, she filed her cross-motion under section 5 of the statute, supported by an affidavit, asking to be allowed to prosecute her action as a poor person. The court overruled the cross-motion and ordered her to give a cost bond, and subsequently dismissed her bill for a failure to comply with that order.

The only question upon this writ of error is whether the circuit court committed reversible error in dismissing complainant's bill because she failed to give a bond for costs. We do not agree with counsel for defendants in error that that ruling cannot be assigned for error. The order requiring security for costs, refusing to allow her to prosecute as a poor person and dismissing her bill was a final order in the case. What was said in *Gesford v. Critzer*, 2 Gilm. 698, *Selby v. Hutchinson*, 4 id. 319, and *Papineau v. Belgarde*, 81 Ill. 61, (relied upon by defendants in error,) applied to the facts of those cases, announced a correct rule of law; but we do not regard either of those cases as authority for the position that an order of a trial court in relation to the giving of a bond for costs, or permitting a person to prosecute as a poor person, cannot be assigned for error where a failure to comply with that order is made the ground for dismissing the action. By the express terms of the statute, whether a person shall be permitted to prosecute a suit without the payment of costs is a matter of discretion with the court. That discretion, however, is not a mere arbitrary power to grant or withhold the relief, but is a sound legal discretion, and, as in all other cases of like character, an abuse of that discretion is an error which may be corrected on appeal or writ of error. The question, therefore, for our decision must be, did the trial court abuse its discretion, under the facts shown in the affidavit of the complainant, in refusing to allow her to prosecute as a poor person.

The language of section 5 of chapter 33 of the Revised Statutes, entitled "Costs," is as follows: "If any court shall, before or after the commencement of any suit, be satisfied that the plaintiff is a poor person, and unable to prosecute his suit and pay the costs and expenses thereof, the court may, in its discretion, permit him to commence and prosecute his action as a poor person." The affidavit upon which the cross-motion was based is, "that she is a poor person and unable to give security for costs, and

that she has no property exempt from execution; that she is the wife of John S. Tracy, and that said John S. Tracy has no property exempt from execution." The affidavit then states that she has a meritorious cause of action, and avers that she has been unable to procure security for costs. Does this affidavit so clearly show that she was, in the language of the statute, unable to prosecute her suit and pay the costs and expenses thereof that we should say the court abused its discretion in not granting her the benefit of that provision? We think not. A person might have no property exempt from execution and be unable to give security for costs and yet be possessed of the means of prosecuting a suit and fully paying the costs thereof. It was not the intention, by the enactment of section 5, to permit all persons to prosecute suits without the payment of costs who might be poor persons or unable to pay such costs, because it is previously provided in section 4 that such persons may be required to give security for costs. The affidavit of complainant may have been absolutely true, and yet she might have been possessed of money or other means with which she could have paid all the costs and expenses of the litigation. In other words, it does not necessarily follow that because persons are poor, or because they cannot give security for costs, or because they have no property liable to execution, that they are without the means of paying costs and attorney's fees in the prosecution of suits brought by them. While it may be true that enough can be gathered from this affidavit, and from that of the defendants upon which they sought to rule her to give security for costs, to show that she was unable to pay such costs and expenses, yet we are not prepared to hold that her affidavit is such a compliance with the requirements of the statute as that the trial court was unauthorized, in the exercise of its discretion, to enter the order here complained of. Its judgment will accordingly be affirmed.

*Judgment affirmed.*

THE PEOPLE *ex rel.* Mason *et al.**v.*JAMES REDDICK *et al.**Opinion filed October 16, 1899.*

1. **MANDAMUS**—*mandamus does not lie to compel payment of a claim not ascertained to be due.* *Mandamus* will lie to enforce the payment of a claim by a sanitary district only when it is ascertained to be due.

2. **SAME**—*when mandamus will not lie to compel payment of a claim.* *Mandamus* will not lie to compel payment by a sanitary district of a claim ordered paid by its board of trustees upon the execution of a receipt in full when no offer was made to comply with the condition imposed.

*Reddick v. People*, 82 Ill. App. 85, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

PEDRICK & DAWSON, for appellants.

CHARLES C. GILBERT, and SEYMOUR JONES, for appellees.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is a petition by Horatio P. Mason, Charles E. Hogue, and others, to the circuit court of Cook county, for a writ of *mandamus* to compel James Reddick, clerk of the Sanitary District of Chicago, and the sanitary district, to pay to petitioners a sum of money alleged to be due them by virtue of an order of the board of trustees to pay the same. The object was to recover a balance of \$15,000 due to petitioners on a contract for work done on the main channel of the sanitary district, the sum having been retained by the board after the completion of the work as an indemnifying fund, to await the termination of certain litigation concerning the work. Appellees de-

murred to the petition. The court overruled the demurrer, and, they having elected to stand by it, judgment was rendered for the petitioners. On appeal to the Appellate Court the judgment below was reversed and the demur-  
rer sustained. Petitioners, appellants here, now prosecute this further appeal.

It is contended by appellants that the board ordered this \$15,000 balance paid to them by their action on March 2, 1898. It appears that the committee on judiciary of the board of trustees of the sanitary district, by their report of February 2, 1898, after reciting that the \$15,000 balance had been withheld by order of the board as an indemnity, that there was then no claim on file against the appellants, and that the board had received an indemnifying bond of \$35,000 in place of the balance retained, recommended that the \$15,000 reserved as aforesaid, in view of the financial responsibility of the firm giving the bond, be paid to appellants "when they shall have filed with the district proper receipts therefor and release in full of the district, to be prepared in the usual form in such cases." This report was on March 2 adopted by the board of trustees. The petition alleges that on March 14, following, petitioners made demand upon James Reddick, clerk of the board, for the \$15,000, and offered to give to him "a proper receipt duly signed by them for said sum," but payment was refused, the receipt demanded by the clerk not being satisfactory to appellants. Appellants then drafted and forwarded to the clerk a receipt they were willing to sign, which pro-  
vided that upon receiving the \$15,000 they "waived and released, and do hereby waive and release, to said San-  
itary District of Chicago, its successors and assigns, and forever discharge it of all liability for reserve percentage, claims or demands of whatsoever kinds or nature arising upon said contract or in any manner connected therewith or relating thereto, except for any demands we may have for interest on delayed payments thereunder; and we do

also waive and release said Sanitary District of Chicago of any and all claims or demands, of whatsoever kind or nature, arising out of or by reason of said contract for the work upon said section 8, excepting only demands on account of interest, as aforesaid." This receipt was the same in form as that demanded by the clerk, save that in this were inserted the words, "except for any demands we may have for interest on delayed payments thereunder." The board of trustees, on March 16 following, adopted a report of the engineering committee, recommending that the clerk of the board pay the \$15,000 only upon the execution of a receipt in the following language: "Know all men by these presents, \* \* \* have waived and released \* \* \* and forever discharged it of all liability for reserve percentage, claims or demands, of whatsoever kinds or nature, \* \* \* except for any demands we may have for interest on delayed payments as to said \$15,000," etc. The reservation here, it will be noticed, excepts only demands which appellants might have for interest on delayed payments as to the \$15,000. In other words, the receipt tendered by appellants left open the question of interest as to all payments under the contract, while the appellees were willing to take a receipt excepting any demands which appellants might have for interest on the delayed payment of \$15,000. Appellants refused to sign this receipt and accept the money. They then drafted and forwarded still another receipt which they were willing to sign, in the following language: "We hereby acknowledge the receipt from the Sanitary District of Chicago of the sum of fifteen thousand dollars (\$15,000), being the amount directed to be paid to us by the board of trustees of said sanitary district at its meeting held March 2, 1898." Upon this receipt the clerk refused to pay the money, whereupon this proceeding was instituted.

From this state of facts, as alleged in the petition, it seems clear this action will not lie. There is a dis-

agreement between the parties as to the amount due on account of interest, the appellees claiming there was no interest due and appellants maintaining the contrary. The board provided that in the receipt the district should be released "in full." The petition does not show upon its face that the petitioners had made a demand upon the secretary of the board for the money with an offer to perform the conditions contained in the order of payment, but, on the contrary, it shows appellants refused to receive the money upon the terms prescribed by the board and were demanding certain reservations as to the payment of interest. The board was clothed with a discretion in the matter of ordering the payment of appellants' claim, and if they saw proper to make an order upon conditions which appellants were unwilling to accept, the latter's remedy was not by this proceeding. (*People ex rel. v. Klokke*, 92 Ill. 134; *County of St. Clair v. People*, 85 id. 396.) Their remedy was by action at law to recover the amount claimed, and not by *mandamus*. Appellants' right to demand interest had not been adjudicated. In this action it does not lie in the mouths of appellants to say that the secretary of the board attached an improper condition to the order which they seek to make the basis of their writ, nor that in an action at law the condition could not be enforced, otherwise the well settled rule of law that *mandamus* will not lie for the collection of debts would be rendered nugatory. In other words, *mandamus* will only lie to enforce the payment of a claim ascertained to be due. Ordinarily, this ascertainment is by way of a judgment. Doubtless where a municipality, by its legally constituted authorities, ascertains a claim to be due and unconditionally orders it paid, that order has the same effect as a judgment; but so long as the order is a conditional one *mandamus* will not aid parties to collect it, unless an offer is made to comply with the conditions imposed.

We are satisfied the judgment of the Appellate Court properly disposed of all questions before it, and that there was no error in sustaining the demurrer to the petition. That judgment will be affirmed.

*Judgment affirmed.*

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CHARLES U. GORDON

*v.*

FREDERICK H. WINSTON *et al.*

*Opinion filed October 16, 1899.*

INJUNCTION—*park commissioners may enjoin erection of piers off Lincoln park shore.* An injunction will be granted at the instance of the park commissioners of Lincoln park to restrain an individual from erecting a pier upon the submerged lands along Lake Michigan, granted by the State to the commissioners in trust for park purposes. (*Revell v. People*, 177 Ill. 468, decides the material questions here involved.)

APPEAL from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

SMITH, BLAIR & SMITH, and WILSON, MOORE & MCILVAINE, for appellant.

JAMES McCARTNEY, and EDWARD O. BROWN, for appellees.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This proceeding by injunction was begun in the circuit court of Cook county August 11, 1896, by the commissioners of Lincoln park, against Charles U. Gordon, to enjoin him from constructing piers upon the submerged lands along the shore of Lake Michigan adjacent to lot 13 of Simmons & Gordon's addition to Chicago, belonging to defendant. The bill alleges that by the act of June 15, 1895, enabling park commissioners having control of any park bordering upon public waters in this State to en-

large the same, and granting to them, for park purposes, the submerged lands in the lake, extending out to navigable water, the commissioners of Lincoln park prepared and adopted a plan for the occupation and improvement of the submerged lands lying between the north line of Grace street extended and the northern limit of the town of Lake View, in Chicago; that by the terms of said act, and the action of the park commissioners in pursuance thereof, "all the submerged land between the limits of said proposed improvements became and was vested" in the commissioners of Lincoln park on November 25, 1895; that on or about August 1, 1896, the defendant, claiming to own the above described lot, "placed upon the submerged lands of Lake Michigan, below the water line, a certain box pier, consisting of large boxes about eight feet square, filled with heavy stone and placed one against the other for a distance of about one hundred and fifty feet upon the submerged lands" aforesaid, belonging to the complainants. As an exhibit to the bill, and as a part thereof, the complainants filed a copy of the resolutions adopted by the park commissioners, by which they availed themselves of the act of the legislature and took possession of the submerged lands in question. To the bill the defendant filed a general demurrer. On March 3, 1898, it was overruled, and the defendant electing to stand by it, the court granted the relief prayed in the bill. Defendant appeals.

Upon this appeal the defendant does not question the validity of the act of the legislature granting to the commissioners these submerged lands, but it is said the facts presented tend to show that the exercise of power by the commissioners was unreasonable. Under the act in question the park board had the right to appropriate the submerged lands extending out to the line of navigation, and no contention is made that they have exceeded that limit. The submerged land upon which the piers were located was the property of the State, granted to appellees in

trust for park purposes, and it is clear they had the right to enjoin any acts on the part of appellant which tended to encroach upon the public domain and gradually appropriate such property to his own use. It will be sufficient to say that the material questions involved in this case have been settled by the decision in *Revell v. People*, 177 Ill. 468.

The decree of the circuit court overruling the demur-  
rer was proper, and it will accordingly be affirmed.

*Decree affirmed.*

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THE FRANKLIN PRINTING AND PUBLISHING COMPANY

v.

MATILDA BEHRENS.

Opinion filed October 13, 1899.

1. TRIAL—variance is not a ground for instructing jury to disregard counts. Variance or insufficiency of proof is not a proper basis of a motion for an instruction to the jury to disregard counts of the declaration under section 50 of the Practice act, (Rev. Stat. 1874, p. 781,) providing therefor when the counts are faulty.

2. SAME—when count is not so faulty as to permit of jury's disregarding it. In an action for personal injuries a count in the declaration, which is sufficient to sustain a verdict when rendered, is not so faulty as to authorize its withdrawal from the jury by an instruction given, under section 50 of the Practice act, although it fails to allege that the plaintiff was using due care for her safety at the precise time she was injured.

3. SAME—when motion to exclude evidence for variance is properly overruled. A motion to exclude the evidence in an action for personal injuries because of alleged variance is properly overruled, where each of the counts of the declaration contained different allegations of negligence, some of which allegations the evidence sustained although it varied from others.

4. SAME—peremptory instruction must be refused if there is sufficient evidence to go to the jury and sustain a verdict. A requested instruction to find the defendant not guilty in an action for personal injuries is properly refused when there is sufficient evidence to go to the jury under the issues and to sustain the verdict when rendered.

*Franklin Printing Co. v. Behrens*, 80 Ill. App. 313, affirmed.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. CHARLES E. FULLER, Judge, presiding.

JOHN A. POST, and O. W. DYNES, (THORNTON & CHANCELLOR, of counsel,) for appellant.

JOHN C. RICHLBERG, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

Appellee recovered a judgment in the circuit court of Cook county, (which has been affirmed by the Appellate Court,) against appellant, for a personal injury received while a passenger in appellant's elevator. Appellee was employed as a stenographer by one of the occupants of appellant's building in which it operated the elevator, and entered the elevator at the sixth floor, going down, and when about to step out at the first floor through the door which the boy in charge of the elevator opened for her exit, and before she could leave the elevator, it suddenly started and went upward rapidly, and appellee was caught and crushed and severely and permanently injured.

The evidence was conflicting, but it was sufficient to sustain the finding that the injury was caused by the appellant while appellee was using due care for her own safety. We need not here consider the extent of appellee's injuries, for, while it is insisted that the damages allowed were excessive, that question received its final answer in the Appellate Court.

At the close of the plaintiff's evidence, and also at the close of all the evidence, the defendant moved the court to withdraw from the consideration of the jury each of the two counts of the declaration, because, as to the first count, it did not, it is said, allege that the plaintiff was using due care for her own safety at the precise time she

was injured, and because of a variance between the allegations and the proof; and as to the second count, because the proof did not sustain that count. This motion was properly overruled as to each of the counts. The alleged defect in the first count could not be reached by such a motion. The counts were sufficient to sustain the verdict when rendered, and even if, at the close of the evidence, the defendant had asked the court to instruct the jury to disregard such counts as faulty under section 50 of the Practice act, the instruction would necessarily have been refused. (*Consolidated Coal Co. v. Scheiber*, 167 Ill. 539.) The proper basis of such a motion to so instruct the jury is that the counts are faulty, and not that there is a variance or insufficiency of proof. Nor was the alleged defect in the first count sufficient to authorize such an instruction. But if we treat the motion as one to exclude the evidence because of such alleged variance, still it was properly overruled. Each of these counts contained different allegations of negligence, and while the evidence varied from some of the allegations it did not vary from, but followed, others. The counts may have been bad, on special demurrer, for duplicity, but if sufficient of the negligent acts alleged in each were proved to constitute a cause of action nothing more was necessary.

The defendant also asked the court to instruct the jury to find the defendant not guilty. This instruction was properly refused. There was sufficient evidence to go to the jury under the issues and to sustain the verdict which was rendered. The brief of counsel for appellant seems to have been framed for the Appellate Court, where controverted questions of fact may be considered.

Finding no error in the instructions, or elsewhere in the record, the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

ANDREW L. HUNT

v.

HELEN E. D. HAWES.

*Opinion filed October 16, 1899.*

1. **WILLS—*inconsistent clauses—when last will not prevail.*** The rule that of two inconsistent clauses in a will the last prevails is applicable only where the real intention of the testator cannot be discovered, and when the two provisions are so totally inconsistent that it is impossible for both to coincide with the general intention of the testator.

2. **SAME—*when restriction on power of alienation is void for repugnancy.*** In a will by one clause of which an estate in land is vested in a devisee for life with power to convey the fee without qualification or limitation, a subsequent clause restricting the power of alienation is repugnant to the estate vested, and absolutely void.

**APPEAL** from the Superior Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding.

AMZI W. STRONG, for appellant.

KIRK HAWES, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Helen E. D. Hawes, appellee, filed her bill in the court below for the specific performance of a contract made with appellant for the sale and purchase of lot 25 in Dunham's subdivision, in Cook county, Illinois. The defense was that the complainant could not comply with the terms of the contract on her part by conveying a good title. It was stipulated that the title to the lot was good in John H. Dunham, the father of appellee, at the time of his decease, and that whatever power or authority she had to sell and convey she derived under the provisions of his will. Whether or not she had such authority depends upon the construction to be placed upon the fourth and seventh clauses of that will.

By the fourth clause there is devised to Mrs. Hawes, with other property, one hundred lots in Dunham's sub-

division, the language of the will being: "In fee for and during her natural life, without impeachment for waste, with full power to occupy, possess and enjoy, with all the rents, issues and profits thereof, with the right and power also to sell and by deed grant and convey, in fee simple absolute, to her grantees, their heirs and assigns forever, and to receive and dispose of the purchase money at her sole and exclusive discretion, in like manner as if she were a *feme sole*, fifty (50) of the lots above described, which she may elect in the said town of Hyde Park, but with no power to encumber or mortgage the same except as hereinafter provided in rebuilding upon the same, with the right and power also by will to devise and dispose of the remainder, in fee simple absolute, of all the real estate above described or hereinafter described in this fourth (4) item of my will, to such devisees as she shall make by her said will, their heirs and assigns forever. But it is expressly provided that she shall have no other right or power, during her lifetime, to alien, convey, encumber or dispose of the same otherwise; but no restraint upon alienation herein contained is to prevent her leasing the same from time to time, as provided hereinafter in item seventh (7)."

Item 7 of the will is as follows: "It is my intention, by the provisions of my will, as far as possible beyond contingencies, to secure the future support of my dear children, as well as of my dear wife, in case she should survive me, and it is therefore my will that neither of my said daughters Helen Elizabeth Dunham Hawes and Mary Virginia Dunham shall have the right or power, at any time hereafter, during their lives, to alienate, release, encumber or in anywise convey away their right or title to, or property or interest in, the several lots, pieces or parcels of land severally devised to them for life, except as hereinafter specifically authorized, viz., except by way of lease. \* \* \* And any attempt on the part of either of said daughters to alien, encumber,

convey or release their property and interest in the lots, pieces or parcels of land hereinbefore devised herein, respectively, for life, or to charge the same, by way of mortgage or any form of encumbrance, except as herein-after provided, or the demise or lease of the same for a longer period than five (5) years of improved property and eighteen (18) years of unimproved property, shall work a forfeiture of the interest, property and estate of the person violating this provision. And I do hereby expressly declare that the gifts, devises and bequests to my said daughters hereinbefore made to them, respectively, for life, are upon the express condition that they shall not attempt to alien, encumber, convey, release, mortgage, demise or in anywise encumber the property so given and devised, respectively, for life, or their interest or property therein, except as aforesaid."

Lot No. 25 is one of the one hundred devised to appellee in clause 4 of the will. Four of these lots had been previously conveyed by her to other parties, this being the fifth of the fifty which she was empowered to convey in fee simple. The superior court granted the prayer of the bill, and the defendant appeals.

It is conceded by appellant that if item 4 of the will stood alone, unrestricted by any subsequent provision of the instrument, appellee would have the right to sell and convey, in fee simple absolute, the lot in question. But it is insisted that the power contained in that clause is taken away by the seventh. And in support of the contention counsel invokes the rule, sometimes applied in the construction of wills, that if two provisions are totally irreconcilable, the last is to be taken as evidence of a subsequent intention, and shall prevail. While this rule has been followed in many cases, the principle is applicable only where the real intention of the testator cannot be discovered, and where the two provisions are so totally inconsistent that it is impossible for both to coincide with the general intention of the testator.

(*Dickison v. Dickison*, 138 Ill. 541.) The rule is not applicable to this will. As we shall see, if the testator intended item 7 to apply to the fifty lots, one of which is No. 25 in question, it is void. While the language, "in fee, for and during her natural life," is contradictory as to the estate intended to be conveyed, it doubtless was the purpose of the testator to give Mrs. Hawes the property during her life, and with a clearly expressed power to convey the fee. Certainly it cannot be said that the life estate vested in her without any qualification or limitation whatever, and, therefore, any subsequent clause of the will, if construed as manifesting an intention to take away from her the power of alienation, must be held ineffective, it being the established rule in this State that, both as to vested estates in fee and for life, unless there is some qualification or limitation, any restriction upon the power of alienation is repugnant to the estate vested, and absolutely void. (*Henderson v. Harness*, 176 Ill. 302, and authorities there cited.) Having admitted that the estate in this lot was so vested in appellee, by the fourth clause of her father's will, that she could legally convey it, and insisting that that power is taken away by the seventh item, appellant cannot escape the application of this rule, and practically, under the law, admits that the latter item can have no application to the question to be decided. In other words, if the testator intended the restriction to apply to this lot it is absolutely void; if he did not so intend, there is no restriction, legal or illegal, as to it. Whether or not that restriction is valid as to the lots devised for life with a qualification or intention, if there is any such, we are not now called upon to decide.

There is no language in testator's will which indicates an intention that the appellee should be compelled to select at one time the whole number of fifty lots which she is empowered to convey in fee simple absolute.

Perceiving no error in the decree rendered by the superior court it is therefore affirmed. *Decree affirmed.*

## JENNIE H. KNORST

*v.*

## JOHN KNORST.

*Opinion filed October 16, 1899.*

**EVIDENCE**—when the fact of marriage is not proved in suit for divorce. In a suit for divorce the fact of marriage is not shown where there is no proof that a license was issued, the officiating minister is not produced as a witness nor any attempt made to account for his absence, and when the letters, business transactions, frequent declarations and various writings signed by complainant subsequent to the date of the alleged marriage are inconsistent with it.

*Knorst v. Knorst*, 80 Ill. App. 344, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. JOHN BARTON PAYNE, Judge, presiding.

EDWARD U. FLIEHMANN, and MAX J. RIESE, for appellant.

D. M. KIRTON, and CLAUDIUS PETERS, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

The plaintiff in error filed a bill against the defendant in error charging him with extreme and repeated cruelty, and on hearing a decree for divorce and for alimony and for solicitor's fees was entered in her favor. He prosecuted a writ of error to the Appellate Court for the First District, and there a judgment was entered reversing the decree of the superior court, and she sues out this writ of error.

Both the parties were married, and each was divorced before this alleged marriage, and each had children. The plaintiff in error was divorced from her former husband in July, 1892, and she claims that a marriage was solemn-

nized between her and the defendant in error September 22, 1894. She claims to have been married by one Rev. Hayes, who, she says, lived on West Adams street, west of Ashland, in Chicago. This marriage is denied by the defendant in error, who shows that intimate relations existed between him and the plaintiff in error for several years before, as well as after, September 22, 1894, and he asserts that he sustained illicit relations with her during this period. She denies all illicit relations with him prior to September 22, 1894, when she claims to have been married. She testifies that she received a certificate of marriage from Rev. Hayes, which she claims she showed to other persons, and which she claims was torn up and put in the stove by defendant in error on an occasion when a quarrel was had between them. Mrs. Samuels testified that she saw on one occasion, and read part of, what purported to be a marriage certificate between these parties, and that she read in it the name Hayes. Hayes is not produced as a witness nor is his absence accounted for. The plaintiff in error says that the defendant told her when he tore up the certificate that the minister was not an ordained minister. This he denies, and also denies that there was ever any ceremony of marriage performed or that a certificate of marriage between them ever existed. She offered in evidence two envelopes addressed in the handwriting of Knorst, post-marked in Chicago in November and December, 1894, and directed to "Mrs. J. Knorst, Philadelphia, Pa." She was in Philadelphia at that time, and testified that the letters which were contained in these envelopes were destroyed by Knorst at a time when they were quarreling. Several witnesses testify that Knorst, on different occasions after September 22, 1894, introduced the plaintiff in error as Mrs. Knorst, said she was his wife, and so called her. They also testified to acts and relations between the parties tending to show that they were living together as husband and wife. A still greater number of witnesses,

apparently equally credible, testified that during the same period the defendant in error spoke to the plaintiff in error in their presence and addressed her as Mrs. Flynn,—that being her name prior to the time of this alleged marriage,—and those witnesses further testify to acts and statements on the part of both of these parties tending to show they were not living together as husband and wife. There were introduced a number of letters written by the plaintiff in error in November and December, 1894, and in January, 1895, which contained numerous expressions wholly inconsistent with her allegation that she was his wife. She does not address him or use any word in any of these letters tending to show that he was her husband. She asks him when he comes to Philadelphia to stop and see an old friend, (referring to herself,) and further states in one of her letters: "You told me yourself that you would not be true to me, as you was nothing at all to me." In still another she writes: "I am alone in this cold and cruel world, without husband, child or friend, all for your sake, and I have received my reward in the short space of three years." In still another letter she says: "Wish you would not change my name. One time you address Knorst, then Flynn. The last letter you sent you addressed Flynn. It don't make much difference, for they call me Mitchell, Knorst and Flynn, only it looks bad to strangers."

Numerous papers were offered in evidence, among others a chattel mortgage made by the plaintiff in error; a check made by the defendant in error, payable to and endorsed by her; a promissory note made by Knorst, payable to her and endorsed by her as paid; a bill of sale from the Gormully & Jeffery Manufacturing Company to her; an agreement between her and the Gormully & Jeffery Manufacturing Company, as also other papers executed by her at different dates in 1895 and in 1896, and all were in the name of Flynn, and all made after the time she claims to have been married to him and claims

to have been known as his wife. It appears she brought suit in the name of Flynn in 1895, against one Weber.

Plaintiff in error claims that a license was handed to the minister by Knorst, but it does not appear that any attempt was made to show that a license was issued. Her conduct in reference to making no effort to show the issuing of a marriage license, and in failing to show that she made any effort to account for the absence of the minister who performed the ceremony, together with her frequent business transactions in the name of Flynn long after she alleges the marriage to have taken place, is absolutely inconsistent with her claim that she was ever married to Knorst. Her letters, her business transactions, her frequent declarations, and the various writings signed by her, are all in conflict with the claim she makes of having been married to him.

On a careful examination of all the evidence we are satisfied that the conclusion reached by the Appellate Court was correct, and its judgment reversing the decree of the chancellor on the hearing is affirmed.

*Judgment affirmed.*

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FERDINAND SIEGEL *et al.*

v.

A. H. ANDREWS & Co.

*Opinion filed October 19, 1899.*

1. APPEALS AND ERRORS—*master's approved finding of fact will stand unless clearly incorrect.* A master's finding approved by the chancellor will not be disturbed by the Supreme Court when not manifestly and clearly against the weight of evidence.

2. SAME—*a party cannot complain of a decree from which he has not appealed.* Error in dismissing a cross-bill, in a creditors' bill proceeding, as to certain defendants cannot be assigned on appeal from a final decree in the cause, where the decree dismissing such cross-bill was not appealed from.

3. SAME—*when finding of fact is not prejudicial to appellants.* In an action where the controlling question of fact is as to the value of

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92a	1828
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97a	1544
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100a	1488
101a	1885
181	350
102a	1116
102a	1858
102a	1477
102a	1481
102a	1498
181	350
105a	1289
105a	1516
181	350
	1464

licenses transferred by stockholders in a corporation in full payment for their stock, a finding that a specified directors' meeting was a pretended meeting is of no importance, and not prejudicial.

181	850
110a	1852
181	850
111a	527

4. *SAME—when finding that certain defendants were non-residents can not be complained of.* In a suit to enforce the liability of stockholders for unpaid subscriptions, a finding that specified defendants are non-residents cannot be complained of by co-defendants as not sustained by evidence where their liability is severable, or where the abstract fails to show that the court had any jurisdiction over the defendants so found to be non-residents.

5. *SAME—when finding that certain defendants were insolvent cannot be complained of on appeal.* A finding, in a suit to enforce against stockholders their unpaid stock subscriptions, that certain of the defendants are insolvent cannot be complained of, on appeal, by co-defendants, where the liability is severable, and where the bill was dismissed as to the alleged insolvents at the time a final decree was rendered.

6. *JURISDICTION—parties cannot question jurisdiction of person after submitting to it.* Parties who appear, plead, and submit to the jurisdiction of the court over their persons cannot thereafter be heard to question it.

*Siegel v. Andrews & Co.* 78 Ill. App. 611, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

The Colby Testing Machine Company, a corporation, the owner of a patent apparatus for testing lungs, registering weight of persons, etc., sold a license to use and sell its patent in the State of Missouri to appellants and several other gentlemen, by contract dated December 27, 1888, for \$15,000,—\$5000 of which was to be paid in cash, \$5000 in six months and \$5000 in twelve months. Annexed to and part of the same agreement is a further agreement, dated January 14, 1889, by the same gentlemen above named and thirty others, to pay toward the purchase of said license different amounts, ranging from \$125 to \$1000,—in the aggregate \$15,000,—the first payment to be made before January 27, 1889. January 12, 1889, there was filed with the Secretary of State of Illi-

nois an application for forming a corporation to be known as the "Missouri Colby Testing Machine Company," with a capital stock of \$100,000, in one thousand shares of \$100 each. On February 15, 1889, the Secretary of State issued his certificate of complete organization. All the persons who were purchasers of the license were subscribers for the stock of the new corporation at its par value, in the same proportion that they, respectively, agreed to pay for said license. None of the stockholders ever made payment on their stock except by the transfer of the license to the corporation, though all the stock was issued to them as full paid stock. The corporation was organized for the purpose of vending the Colby testing machine, buying the right to sell said machines in the State of Missouri, and to grant to other parties the privilege to use said machine in that State. December 9, 1890, it appears that one Stanton, a stockholder, had filed a bill against the Missouri Colby Testing Machine Company, the sole defendant, in which the court, by its decree, dissolved the corporation, declared its charter forfeited and that the receiver be ordered to wind up its affairs. When the bill was filed, how the court obtained jurisdiction or what other proceedings had been taken in the case on the original bill does not appear from the abstract.

June 15, 1891, Carl Dernberg, having, by leave of court, been allowed to become a co-complainant with Stanton, filed an amended and supplemental bill, in which is set forth the original bill, and, among other things, alleged that the cause is still pending; that Andrews & Co. had recovered a judgment against the Missouri corporation; that the judgment was fraudulent; that Andrews & Co. had commenced garnishment proceedings against him, Dernberg, and Stanton, Hirsch and Joseph Fish, claiming that they were stockholders and indebted to the corporation on their stock, and prayed an injunction against Andrews & Co. from prosecuting the garnishment proceedings and from beginning any other suits against

them or the corporation. Andrews & Co. answered this amended and supplemental bill, and thereafter, on July 7, 1891, the court issued an injunction as prayed.

June 23, 1892, but after the filing of the cross-bill of Andrews & Co. hereinafter mentioned, the amended and supplemental bill of Dernberg was, on motion of solicitor for complainant, dismissed without prejudice to the cross-bill of Andrews & Co., which, it was ordered, should continue pending and be retained by the court for final hearing.

December 7, 1891, an order was entered giving to Andrews & Co., appellee herein, leave to file a cross-bill. It does not appear in appellants' abstract, although it does appear that February 18, 1893, Andrews & Co., a corporation, filed an amended cross-bill, which is in form an ordinary creditor's bill, upon a judgment making the Missouri Colby Testing Machine Company and its stockholders defendants, alleging that the stock was paid for only by the license above mentioned and was issued as full paid and non-assessable; that the license was not worth more than \$1000, and that at least ninety-nine per cent of the face value of the stock remained unpaid. This amended bill also alleges that divers of the stockholders are non-residents, that others are insolvent, and prays, among other things, that each of the stockholders who is a resident of Illinois and is not insolvent may be decreed to pay cross-complainant's judgment to the extent of the unpaid portion of his stock in the corporation, and for general relief. By the abstract of appellee of the supplemental record, the original cross-bill of Andrews & Co. appears to have been filed December 7, 1891, and was an ordinary creditor's bill based on a judgment, and sets forth the filing of the original bill and of the amended and supplemental bill and injunction against Andrews & Co.

Appellant Hirsch, on December 3, 1892, answered the cross-bill of Andrews & Co. He admitted he was a stock-

holder, but alleged that his stock was fully paid for, but on April 15, 1893, he entered a special appearance, and suggested to the court that it had no jurisdiction because a final decree had been entered in the cause December 9, 1890.

Appellant Siegel, April 6, 1892, demurred generally to the cross-bill of Andrews & Co., and April 17, 1893, entered his motion to strike the amended cross-bill from the files and to dismiss the case as to him, but for what reason does not appear. Subsequently, Hirsch answered the cross-bill and amended cross-bill, and therein claimed also that the court had no jurisdiction because of the decree of December 9, 1890, and also answered to the merits fully. Siegel also answered the merits of the cross-bill and amended cross-bill of Andrews & Co. fully.

Replications were filed to the respective answers of Hirsch and Siegel by Andrews & Co. Answers of divers other defendants to the cross-bill were filed, as to whom the cross-bill was set down for hearing upon bill and answers of these defendants, and after a hearing thereon the cross-bill was, January 5, 1893, dismissed as to these cross-defendants for want of equity. No appeal was taken from this decree. As to the remaining defendants to the cross-bill, aside from the appellants and the corporation, the abstract fails to show that the court had jurisdiction of them or either of them.

November 11, 1893, the cause was referred to the master to take proof and report the same with his conclusions. The master reported, which report, after numerous objections and exceptions thereto by appellants had been overruled, was confirmed by the court and a decree entered November 13, 1897, finding the facts with regard to the corporation, its original subscription for and payments for stock and stockholders, substantially as before stated; that a certain directors' meeting of February 27, 1889, was only a pretended meeting; that there was due to Andrews & Co., on its judgment, from the corporation,

the sum of \$4037.23 and costs; that there was still unpaid on the stock of Siegel \$5666.66 and on the stock of Hirsch \$1416.66, and upon the stock of each of six other stockholders the same amount as was found due from Hirsch, aggregating in all \$15,583.28, and decreed that Siegel pay the amount due Andrews & Co., and that each of the other seven stockholders also pay to Andrews & Co., on its judgment, the respective amounts found due from each, and further decreed that whenever Andrews & Co. shall have received the amount of its judgment, interest and costs, whether the amount be recovered from one or more of the defendants, the decree shall then be satisfied in full as to each and all of the defendants. From this decree appellants appealed to the Appellate Court, which affirmed the decree.

A. BINSWANGER, and ROSENTHAL, KURZ & HIRSCHL,  
for appellants.

CHARLES C. ARNOLD, for appellee.

Per CURIAM: In deciding the case the Appellate Court delivered an opinion, of which the following, with a few slight changes, is a copy:

"Appellants have each separately assigned fifty-four errors, or one hundred and eight in all, all of which are urged upon the consideration of the court. We are of the opinion that their substance may be fully stated, viz.: First, that the chancellor was in error in holding that the stockholders did not fully pay for their stock, but only paid fifteen per cent of its par value; second, that it was error to dismiss the cross-bill as to defendants who answered and had a hearing on the cross-bill, and their respective answers; third, that it was error to hold that the directors' meeting of February 28, 1889, was only a pretended meeting; fourth, that there was no evidence to sustain the finding of the court that certain defendants were non-residents, thus placing an undue burden

upon appellants; fifth, that there was no evidence that defendants Adler and Baer were insolvent, as found by the master and court; and sixth, that it was error to proceed without bringing the principal party, the corporation, a judgment debtor, into court, and long after final decree on the original bill.

"The first contention raises a question of fact, which has been passed upon adversely to appellants by the master. This finding has been approved by the chancellor, and, after a careful reading and consideration of the evidence, we cannot say that its weight is manifestly and clearly against the finding, and that being so, we should not and will not disturb it. *Miltimore v. Ferry*, 171 Ill. 219.

"The second contention is not tenable, because appellants have not appealed from the decree dismissing the cross-bill as to defendants who had a hearing on the bill and answers. This decree was entered January 5, 1893, and the decree appealed from was entered November 13, 1897. Appeals are purely statutory, and no one can, on appeal, complain of a decree from which he has not appealed. Moreover, this being a creditor's bill, one defendant stockholder alone might have been pursued, to the exclusion of all other stockholders. *Palmer v. Woods*, 149 Ill. 146.

"We are unable to perceive how the holding of the court that the directors' meeting of February 27, 1889, was a pretended meeting, in any way prejudiced appellants. The controlling question of fact in the contest was as to the value of the licenses transferred by the stockholders in full payment for their stock, and whether this meeting was a pretended one or not we do not think was of any importance.

"The fourth contention cannot be urged here, because, as to the defendants whom the court found to be non-residents, the abstract fails to show that the court had any jurisdiction. (*Gibler v. City of Mattoon*, 167 Ill. 18.) If the court had no jurisdiction of these defendants the

error was harmless. Moreover, their liability was severable, and in no way depended on the claim against appellants. (*Palmer case, supra*).

"The same reason applies to the fifth contention. Also it is not tenable, because, as to the defendants Adler and Baer, the bill was dismissed on motion of cross-complainant at the time the final decree was rendered.

"*Sixth*—This contention, in so far as it is based on the claim that the principal debtor was not in court, cannot be sustained, because it appears affirmatively that it was served with process November 11, 1890. As to the court's proceeding long after final decree on the original bill, the appellants cannot now be heard to object for two reasons, viz.: First, because, after the entry of what they claim was the final decree, December 7, 1890, an amended and supplemental bill in the cause was filed June 15, 1891, which was pending and undetermined when the cross-bill of Andrews & Co. was filed, and when this amended and supplemental bill was dismissed the cross-bill was expressly retained for a final hearing; second, that the court had jurisdiction of the subject matter cannot be questioned, and these appellants, before making any objection to the jurisdiction of the court whatever, appeared, Siegel demurring generally and Hirsch answering the cross-bill. They thus submitted to jurisdiction over their persons. Had they wished to raise the question of jurisdiction they should have pleaded, and having failed to do so, cannot now be heard to object to the right of the court to proceed. (*Parker v. Parker*, 61 Ill. 369).

"The above considerations make it unnecessary to pass upon appellants' motion to strike out certain parts of the record. The decree is affirmed."

We concur in the foregoing views and in the conclusion above announced. Accordingly, the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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112a, 808  
8

181 858  
218 80

GEORGE A. SEAVERN S

v.

GEORGE LISCHINSKI.

*Opinion filed October 19, 1899.*

1. **BILLS OF EXCEPTION**—*bill is complete though objects shown the jury are not contained therein.* A bill of exceptions contains all the evidence if it includes that which was presented at the trial, although objects, persons or scenes of which the jury may have had a view are not contained in it.

2. **APPEALS AND ERRORS**—*record of Appellate Court cannot be contradicted by resort to its opinion.* A recital in the record that the Appellate Court considered and determined all the assignments of error and found no error in the record cannot be overcome by expressions in the opinion of the court.

*Seaverns v. Lischinski*, 82 Ill. App. 298, affirmed.

**APPEAL** from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN BARTON PAYNE, Judge, presiding.

JOHN A. POST, and O. W. DYNES, for appellant.

FRED H. ATWOOD, and FRANK B. PEASE, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellee was a laborer at appellant's elevator and was injured in consequence of the breaking of a rope called a "sling," by which a pulley was fastened to the ties and timbers of a railroad track as part of a tackle for moving freight cars. He recovered a judgment for his damages in the superior court of Cook county on the ground that appellant did not discharge the employer's duty to furnish reasonably safe appliances and to keep them in reasonably safe condition and repair. Appellant removed the record by appeal to the Branch Appellate Court for the First District, and that court having affirmed the

judgment, he has prosecuted a further appeal to this court.

Aside from questions of fact, which we are not permitted to review, the only complaint made is that the Appellate Court refused to consider appellant's assignments of error, merely because the rope, which was produced in the trial court by him and exhibited to the jury, was not contained in the bill of exceptions. In the absence of anything in the record showing that fact it will not be presumed that the Appellate Court adopted such a rule or refused a hearing and consideration of the assignments of error for such a cause. It has never been held in this State that a jury might return a verdict upon their own knowledge, unsupported by other evidence, whether such knowledge was acquired in or out of court, by a view or otherwise, and a verdict based exclusively on knowledge so acquired would be set aside for want of substantial evidence to support it. A verdict unsupported by sworn testimony, upon disputed facts, has always been successfully challenged, whether there was a view or not, and if a jury has disregarded such evidence, or there is none which a reasonable person might believe and act upon, the verdict should be set aside. To allow jurors to make up their verdict upon a disputed fact from their own individual observation would be most dangerous and unjust. In the very nature of things it is ordinarily impossible to put in a bill of exceptions persons, places or things exhibited to a jury, and it would be absurd to construe the certificate that the bill contains all the evidence as including such things. Rules of practice are adopted in furtherance of justice, and not as pit-falls for litigants, nor to enable a court of review to put out of court a party who feels himself aggrieved by a judgment and asks for a consideration of his complaints. The sense in which a bill of exceptions is understood, and the only reasonable meaning to be given to the certificate used, is that the bill does contain all the evidence if it

contains that which was presented at the trial, although objects, persons or scenes of which the jury may have had a view are not contained in it. And such is the rule. (*Jeffersonville & C. R. R. Co. v. Bowen*, 40 Ind. 545.) A court of review would not refuse to consider whether a verdict was sustained by substantial evidence because a wound or injury had been exhibited in court to the jury to permit them to see its character or extent, or personal marks had been exhibited in a case of personal identity where they were relevant, or a view of the scene of a crime had been permitted, because the person or the place was not attached to the bill of exceptions.

Cases where a view has been permitted which the jury might consider in arriving at their verdict, either as evidence or to enable them to construe and apply the testimony, may stand on a somewhat different footing than when there has been no such view, but a verdict cannot be based alone upon seeing a rope or a building or the evidence of the senses. (*Thompson on Trials*, secs. 901, 902.) Of course, a view of this rope would not determine the questions whether the damages were excessive, or the plaintiff negligent, or whether the risk was assumed in his contract of employment; and besides, there was a very full description of the rope by sworn testimony in the court.

Not only is there no presumption that the Appellate Court refused to consider the assignments of error, but the record recites that they were considered and determined. The record and judgment of the court cannot be overcome by its opinion, and the record shows that the court considered and determined all the assignments of error and found no error in the record. There is no question of law for the consideration of this court, and the judgment of affirmance is conclusive on all questions of fact.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

FRANK ADAMSKI

v.

JOHN WIECZOREK.

181	861
215	189

*Opinion filed October 19, 1899.*

**APPEALS AND ERRORS**—when *freehold is not involved in appeal*. In a suit to have a deed for land absolute on its face declared a mortgage and a right of redemption therefrom allowed no freehold is involved, and a writ of error will not lie directly to the Supreme Court, although, as an incident to the right of redemption, a deed made *pendente lite* by the defendant to a third person was set aside as a cloud on the title.

**WRIT OF ERROR** to the Superior Court of Cook county; the Hon. JOHN BARTON PAYNE, Judge, presiding.

On the 18th day of June, 1890, John Wieczorek was the owner of certain premises in Chicago, and he and his wife and Jacob Zalewski and wife executed a deed purporting to convey the premises to Frank Adamski. The instrument, although in form a deed, was claimed by the grantors to be in fact a mortgage given to secure the payment of a certain sum of money. After obtaining the deed the grantee set up title to the property, and John Wieczorek filed his bill to declare the deed a mortgage and for an accounting. Answers were filed and a hearing had on the pleadings and evidence, and the court entered a decree dismissing the bill at the complainant's costs. This decree was rendered on the second day of June, 1891. Afterwards, on February 18, 1893, Wieczorek filed a bill in the nature of a bill of review, against Adamski, to impeach and set aside that decree and to obtain a rehearing of the matters alleged in the bill which had been dismissed, and for relief. The ground upon which it was sought to set aside the decree was that it was obtained by fraud and subornation of perjury on the part of plaintiff in error, and perjured testimony procured and purchased by him for a consideration. In the bill the complainant

set out the original bill *in hac verba*, and prayed "that said bill of complaint may be taken as a part of this his bill of review, and that the allegations thereof may be taken to be hereby and herein specifically set forth and alleged as they and each of them are therein set forth, charged and alleged."

Plaintiff in error answered the bill, and a replication having been filed, on October 16, 1895, a decree was entered, as follows: "This cause having come on to be heard upon the bill of review and amendment thereto of complainant, and the answer of the defendant thereto, and the replication of the complainant to such answer, and the court having heard the testimony introduced in open court and the arguments of the counsel for the respective parties, and being fully advised in the premises, doth find that all the allegations in said complainant's bill are true. It is therefore ordered, adjudged and decreed that the decree entered on the second day of June, 1891, in the original suit of John Wieczorek against Frank Adamski, lately pending in this court, No. 128,446, and all the proceedings had therein, be set aside and that the complainant be granted a rehearing in said suit."

On October 23, 1895, the complainant filed a supplemental bill, as follows: "Wieczorek represents that on August 5, 1890, he filed his bill of complaint against Adamski, praying that the deed by Wieczorek and wife to Adamski be declared a mortgage, and for an accounting; that an answer was filed by Adamski. Your orator further represents, by way of supplement, that since the filing of the said bill of complaint said Adamski has had possession of said premises and has received all rents and profits therefrom, which amounted to about \$50 per month; that during the month of July, 1891, he caused to be removed from said premises two two-story frame buildings situated thereon, and thereby damaged the said premises to the sum of \$5000. Your orator further represents that on, to-wit, November 24, 1893, said defendant

fraudulently conveyed said premises by warranty deed to one Albert Lobe, who is a brother-in-law of said defendant, for the fictitious consideration of \$4500, which said deed was filed for record with the recorder of Cook county on December 20, 1893." There was a prayer that the deed from Adamski to Lobe be canceled, that the deed from Wieczorek and wife to Adamski be declared a mortgage, and for an accounting.

The plaintiff in error put in an answer to the complainant's bill and also to the supplemental bill, and replications having been filed, the cause proceeded to a hearing and the court entered a decree, as follows: "And this cause having now come to be heard upon the bill of complaint herein, the answer of the defendant, Frank Adamski, thereto and the replication of the complainant to such answer, and the complainant's supplemental bill of complaint filed herein, and the court having heard the argument of counsel for the respective parties, and being fully advised in the premises, doth find that the material allegations in the said complainant's original and supplemental bill are true; that the equities of this cause are with the complainant. It is therefore ordered, adjudged and decreed that the said deed of conveyance from the said Jan Wieczorek and Juliana Wieczorek, his wife, and Jacob Zalewski and Barbara Zalewski, his wife, to Frank Adamski, bearing date on the 18th day of June, 1890, of the said premises, (premises described,) be and the same is hereby declared a mortgage. It is further ordered, adjudged and decreed that the said deed of conveyance from said Frank Adamski and Antonio Adamski to Albert Lobe, bearing date of the 24th day of November, 1893, of the said premises, to-wit, (describing same,) recorded in the recorder's office of Cook county on the 20th day of December, 1893, be and the same is hereby set aside and declared null and void as against the complainant, his heirs and assigns, as a cloud upon the title of the complainant. And for an accounting between the

parties hereto, the court doth order this cause referred to Master Penoyer L. Sherman, Esq., to ascertain the amount of money, including principal sum and taxes paid by said Frank Adamski on account of the property in controversy in this suit; also, to ascertain the fair value of the buildings and improvements upon said premises at the time the said deed in controversy was made as of that date, together with the rental value of said buildings and premises during the period from date of said deed until said master's finding; also, to ascertain the value of the building now situated upon said premises, as of date it was placed thereon; that interest be computed at seven per cent on moneys paid, and rentals; that the evidence heretofore taken on trial of this cause may be used by either party, and the right be allowed each to offer such new testimony as may appear necessary in said accounting."

Under this decree an account was taken before the master in chancery, and upon the master's report to the court (after a modification of the report by the court) a final decree was rendered, to reverse which a writ of error was sued out in this court.

WALSH & MCARDLE, for plaintiff in error.

ADELOR J. PETIT, and MILLARD F. RIGGLE, for defendant in error.

Mr. JUSTICE CRAIG delivered the opinion of the court:

A motion was made to dismiss the writ of error on the ground that a freehold was not involved, and that motion was reserved until the hearing. On a bill seeking to have a deed for land absolute on its face declared a mortgage and a right of redemption therefrom allowed no freehold is involved, and in a case of that character a writ of error will not lie directly to this court. (*Kirchoff v. Union Mutual Life Ins. Co.* 128 Ill. 199.) In *Lynch v. Jackson*, 123 Ill. 360,

and *Hollingsworth v. Koon*, 113 id. 443, it was expressly held that the question of the right to redeem under a conveyance claimed to be a mortgage does not involve a freehold, within the meaning of that word as used in section 88 of the Practice act. In the original bill filed by the defendant in error it is alleged that "said instrument, the deed in question, is and of right should be only a mortgage to secure the payment of such sums of money as may be found due Adamski from your orator, which said sum or sums of money your orator is willing to pay and secure to be paid under the terms of said agreement." The bill prays for an accounting and that the deed be declared a mortgage. The supplemental bill and the bill in the nature of a bill of review both proceed upon the same ground, and the decree rendered by the court finds and decrees that the deed is a mortgage. Indeed, the right of defendant in error to maintain his bill is predicated on the ground that the deed made to plaintiff in error was a mortgage. Such being the case, under the rule heretofore established by the decisions cited no freehold was involved.

It is, however, claimed that a freehold is involved because the court, in its decree, set aside the deed from plaintiff in error to Lobe. This deed was made pending the litigation, and when the court found and decreed that the defendant in error was entitled to redeem, the mere fact that the deed to Lobe was set aside as a cloud on the title did not change the character of the bill or the nature of the relief sought. The setting aside the deed was a mere incident to the right of redemption sought in the bill, and it had no bearing on the real question in controversy between the parties.

The writ of error will be dismissed, and leave will be granted plaintiff in error to withdraw the record abstracts, to be used in the Appellate Court if he desires.

*Writ dismissed.*

## THE WATSON CUT STONE COMPANY

v.

WILLIAM SMALL.

181	866
91a	488
181	866
190	7360
181	866
196	885

*Opinion filed October 19, 1899.*

1. APPEALS AND ERRORS—*when insufficiency of evidence cannot be urged as ground for reversal.* That the evidence is not sufficient to sustain the judgment under several of the counts on which the case was submitted to the jury cannot be urged as a ground for reversal, where the appellant's given instructions submitted to the jury the issues raised by such counts.

2. MASTER AND SERVANT—*when question of assumed risk by servant is for the jury.* The questions of assumed risk and contributory negligence on the part of a workman injured by the fall of a corbel stone which he was employed to repair are for the jury, where the evidence is conflicting as to the condition of the stone and what caused it to fall.

3. SAME—*when servant is not chargeable with negligence as a matter of law.* A workman injured by the falling of a corbel stone which he was repairing is not chargeable with negligence, as matter of law, when he was not in a position to see the danger and continued work in reliance upon representations of the foreman as to the condition of the stone.

*Watson Cut Stone Co. v. Small*, 80 Ill. App. 328, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

AMERICUS B. MELVILLE, and F. J. CANTY, for appellant.

WILLIAM C. SNOW, (DARROW, THOMAS & THOMPSON, and D. J. DOWNEY, of counsel,) for appellee.

Per CURIAM: After a careful examination of the record and the argument of counsel in this case we perceive no substantial ground for disturbing the judgment of the Appellate Court. It will therefore be affirmed.

As the questions involved are fully and satisfactorily discussed in the opinion of the Appellate Court, that opinion will be adopted as the opinion of this court. The opinion, and the statement preceding it, are as follows:

"Appellee, an experienced stone-cutter, was injured January 26, 1896, by the falling upon him of part of a defective or broken corbel stone, which extended under the projection of a series of bay windows commencing at the top of the first story of a six-story building at Ellis avenue and Thirty-fifth street, Chicago, while he was engaged in the employ of appellant in cutting out a piece from the stone to put in another piece, and thus repair it. The building was a new one, completed in the fall of 1895, and appellant had the contract for furnishing and setting the cut stone work, including this corbel stone. It employed as sub-contractors the firm of Howarth & Macbeth to set the cut stone, and this firm actually did the work of setting this corbel stone, under the superintendence of appellant. Appellee had nothing to do with the original construction of the building, but was called in by appellant in January, 1896, to repair this corbel stone, it having begun at that time to crack in one or more places, and one piece of it had fallen out before he began the work of repair.

"Appellee's original declaration consists of five counts, the first, third and fifth of which were dismissed by the appellee, and the second and fourth are based upon negligence of appellant in not properly supporting and fastening the corbel stone. Three additional counts were filed November 7, 1897, all of which allege negligence in the original construction or material used therein. Three other additional counts were filed on December 7, 1897, the first of which is based upon the failure of appellant, knowing the danger to which appellee was exposed at his work, to notify him of such danger, and alleging that appellee did not know of the danger. The second and third of these additional counts charged, in different

ways, negligence in the original construction of the building. Appellant pleaded the general issue. A trial was had November 16, 1897, during the course of which appellee dismissed the first, third and fifth counts of the original declaration, which resulted in a verdict on the remaining counts of that declaration and the counts of November 7, 1897, in favor of appellee, of \$1000, which was set aside by the court and a new trial awarded. A second trial was had on these counts and the additional counts filed December 7, 1897, which resulted in a verdict and judgment for appellee of \$1500, from which this appeal is taken.

"At the close of plaintiff's evidence defendant asked an instruction to find it not guilty, which was refused. Defendant then asked seven separate instructions directing the jury to find it not guilty as to each of the several counts then before the jury, except the third count of December 7, 1897, each of which was refused. Each of these same instructions was asked at the close of all the evidence, and refused by the court in the same order as at the close of plaintiff's evidence.

"Among other instructions not in question, at the instance of appellee the court gave the following, viz.:

"18. 'The court instructs the jury that the law is that where a contractor sub-lets a part of the work which he is to perform, to another, and the sub-contractor, in the execution of the work so let to him, is superintended and controlled by the contractor, and the work is performed negligently by the sub-contractor, then the negligence of the sub-contractor is also the negligence of the original contractor, providing the part of the work performed negligently is performed under the supervision and direction of the original contractor.'

"But refused to give as requested by appellant the following, to-wit:

"32. 'If you believe, from the evidence, that the accident in question happened through the negligence of in-

dependent contractors who sub-let from the defendant, the Watson Cut Stone Company, the setting of the stones in question, and that the said contractors were reasonably competent and skillful for the performance of said work, then your verdict will be not guilty.'

"*WINDES, P. J.*: Appellant contends that appellee assumed the risk of the danger to which he was exposed, and if he did not he was guilty of contributory negligence; that the court erred in refusing the several instructions noted in the statement, and in giving appellee's eighteenth instruction.

"We are inclined to the view that the evidence is not sufficient to sustain the judgment under either of the several counts on which the case was submitted to the jury, except the first additional count filed December 7, 1897, which is based upon the failure of appellant to notify appellee of the danger to which he was exposed while engaged in his work for appellant. But however that may be, we are of opinion this cannot now be urged as a cause for reversal, because appellant asked the thirty-second instruction upon the theory it was not liable for any negligence charged, and the court gave at its instance several instructions in which is submitted to the jury the question of any and all negligence charged against it. *Jeffery v. Robbins*, 73 Ill. App. 353; *Egbers v. Egbers*, 177 Ill. 82.

"This fact, we think, also eliminates from the case any question of independent contractor, which is made by appellant. But even if this were not so, the clear preponderance of the evidence is against appellant on this point. A verdict for appellant based on the theory of independent contractor could not be sustained by the evidence. The evidence shows that appellee is an experienced stone-cutter and familiar with the manner of construction of such buildings as this one. He testified in part, to-wit: 'I went to the building and the scaffold had been partly erected. Mr. Beck and I finished the

balance of the scaffolding at Thirty-fifth street and Ellis avenue. Then he showed me what he wanted me to do, and I looked up at the hole in the stone and asked him what was the cause of that breaking away. The break was in the corbel on Thirty-fifth street. I asked him if there was any weight on the nose of the corbel stone, and he said there was not. He said he had the mortar all sawed out. I said, 'What made that piece fall away there?' and he said, 'The stone-cutter, in drilling that anchor hole in there, the piece broke away and came down.' So he said the stone-cutter strained the stone when he was drilling for the anchor. The anchor is a piece of iron about an inch in diameter. It came down from the floor above. I don't know what it was fastened to, but it came down and was let into the corbel stone about three or four inches, to sustain the weight of the corbel from falling out into the street.

"Q. 'And was it fastened below—screwed in?'

"A. 'No; it was leaded. Boiling lead was run around the iron. I asked him then, the second time, about the mortar. I asked him if there was any mortar in that stone around the top of the corbel stone, and he said no, he had it all sawed out, and there was nothing in there at all. There is no weight on that, he said. The wall is faced with stone, and behind is brickwork that is carried up.'

"The court: 'The wall is really brick and faced with stone?'

"A. 'Yes, the brickwork is about eighteen inches thick. The first story is called the basement. It is about fifteen feet to the top of the corbel stone. The corbel is above the first story.'

"It is shown from this and other evidence that appellant was familiar with the ordinary methods of construction of such buildings, and that he suspected that the cause of the break in the corbel stone was because the mortar which should have been placed between the cor-

bel and ashlar stone above at the time of the construction of the building had not been removed, as should have been done in proper construction. Appellee also says that the seam or joint between the corbel stone and ashlar above it was about eighteen inches above him; that he could not see it from where he was working below, and the evidence shows that while he was so working the corbel stone gave way, broke down the scaffolding on which appellee was at work and injured him. Whether or not this mortar had been sawed out from between the corbel stone and ashlar, as represented by Beck to appellee, was a question in dispute on which there was a conflict in the evidence. There was also a question on which there was a conflict in the evidence as to whether the failure to saw out the mortar, if such was the fact, was a sufficient cause to account for the giving way of the corbel stone, and also whether that was what caused it to give way and fall.

"From a careful consideration of the evidence in these respects (which it seems unnecessary to set out in detail) we think it justified the jury in finding, as it must have done, that the mortar was not sufficiently sawed out to prevent a pressure of the ashlar stone from above on the corbel, and that that fact was a sufficient cause for and did cause the giving way of the corbel stone, and the consequent injury to appellee.

"The questions of assumed risk and contributory negligence, so thoroughly and fully presented by appellant's counsel, were in our opinion, under the facts of this case, purely questions of fact for the jury and not of law for the court. We do not, therefore, review the numerous cases cited, believing, as we do, that there was no error in submitting the case to the jury,—at least upon the first of the amended counts of December 7, 1897. (*Ofutt v. World's Columbian Exposition*, 175 Ill. 472, and cases there cited.) Appellee had the right to rely on what Beck told him in regard to the mortar being sawed out, and it was

not negligence, as matter of law, for him to continue his work after this statement from Beck, when appellee was not in a position to see the danger.

"Objection is also made to the admission of certain evidence relating to the manner of construction of the building and its effect upon the corbel stone in question, but we do not think it of importance, and there was no reversible error in the court's rulings in this regard.

"The judgment is affirmed."

*Judgment affirmed.*

181	872
207	•847
181	872
215	•270

OLIVER P. HUNT

*v.*

JOSEPH MILTON SAIN *et al.*

*Opinion filed October 19, 1899.*

1. DRAINAGE—*when ditch is within provisions of Drainage act of 1889.* A ditch constructed in a continuous line across the lands of adjoining owners by mutual license and agreement, whether it is an entirely new ditch or an old one re-opened, is within the provision of section 1 of the Drainage act of 1889 (Laws of 1889, p. 116,) which declares such drains to be for the mutual benefit of all the lands interested therein, and the provisions of such act apply thereto.

2. INJUNCTIONS—*when mandatory injunction may issue.* One whose right to the maintenance of a ditch and to the unobstructed flow of water through it constitutes a perpetual easement is entitled to a mandatory injunction directing the removal of an obstruction.

3. EASEMENTS—*easement to maintain ditch is not extinguished by an unexecuted parol agreement.* An easement to maintain a ditch is not extinguished by an unexecuted parol agreement between owners of the dominant and servient tenements, giving the latter the right to fill up the ditch.

4. EVIDENCE—*burden of showing abandonment of easement is on party asserting it.* The burden of proof to show the abandonment of an easement rests upon the party asserting it.

5. LICENSE—*when parol license to construct ditch is irrevocable.* A parol license for the construction of a drain is irrevocable when the licensee has constructed tile drains upon his land on the faith of the license granted to drain through the ditch.

WRIT OF ERROR to the Circuit Court of Douglas county; the Hon. EDWARD P. VAIL, Judge, presiding.

This is a bill in chancery, filed by the defendants in error on September 30, 1896, against the plaintiff in error, to restrain the latter from continuing the obstruction of an open ditch on his land, alleged to form a continuous line of ditch across the several lands of defendants in error and plaintiff in error, and alleged to have been constructed by the mutual license, consent, or agreement of the owners of these adjoining lands.

A highway runs north and south on the west side of section 22 in township 15, north, etc., in Bowdre township in Douglas county. The highway runs between section 22 on the east side thereof, and section 21 on the west side thereof, in said township. The bill alleges, that the defendant in error, Sain, owned and has owned since May 4, 1884, the north-west quarter of the north-west quarter of said section 22; that defendant, George Hunt, owns and has owned since November 29, 1884, the south-west quarter of the north-west quarter of section 22; that the defendant in error, Morris Bennett, owns and has owned since March, 1892, the north-east quarter of said section 21; that the commissioners of Bowdre township have the supervision and control of said highway; and that plaintiff in error, Oliver P. Hunt, is the owner of the east half of the north-west quarter of said section 22. Formerly, one Peck owned the west half of the north-east quarter of said section 22, but, at the time the bill was filed, one Dressback seems to have been the owner of the west half of said north-east quarter. The ditch in question appears to have been constructed with the consent of the owner or owners of the north-east quarter of section 21, the north-west quarter of the north-west quarter of section 22, the east half of the north-west quarter of section 22, the west half of the north-east quarter of section 22, and the south-east quarter of section 15.

The bill alleges that, for more than twenty years before January 1, 1896, there was constructed by the mutual license, consent, and agreement of the owners of the adjoining lands above described an open ditch, so as to make a continuous line upon, over, and across the said lands. The ditch in question began at a point on the west line of the north-west quarter of section 22, and ran east therefrom between the north-west quarter of the north-west quarter and the south-west quarter of said north-west quarter of said section 22, across the east half of the north-west quarter now owned by the plaintiff in error, between the north forty and the south forty thereof, and eastward across a portion of the west half of the north-east quarter of said section 22 through a natural draw to the main outlet, running north-eastwardly to what was called Scattering Fork.

The bill further alleges that, for more than twenty years before January 1, 1896, by the agreement and consent and acquiescence of said land owners, the waters from the north-east quarter of section 21, and from said highway, and from the west half of the north-west quarter of said section 22, have drained into and flowed through that part of said ditch, which crosses the east half of the north-west quarter of said section 22, owned by the plaintiff in error; that said waters so flowed through said ditch upon the lands of plaintiff in error by his agreement, consent, and acquiescence, after the construction of the ditch jointly by said land owners. The bill further avers that, in April, 1896, plaintiff in error obstructed and filled up said ditch upon the east half of the north-west quarter of said section 22, by throwing into the same earth and brush and other material; that, thereby, the waters draining through the lands of the defendants in error and through said highway, were dammed up and forced back, so as to be prevented from flowing away from the lands of defendants in error and from the highway; that, thereby, defendants in error were deprived of

the right of the flow of water through said ditch upon the land of plaintiff in error; and that, thereby, their crops have been injured, and their tile drains stopped, and their lands rendered wet and swampy.

The bill further alleges that, by reason of the filling up of said ditch, the damages will be irreparable, continuous, recurring, and lasting; that they are not susceptible of reparation at law, and that the aid of equity is necessary to prevent a multiplicity of suits.

The answer of the plaintiff in error denied, that the ditch in question was made more than twenty years before the filing of the bill, or that it was made with the mutual license, consent, or agreement of the defendants in error, or any, or either of them. The answer sets up that, in 1877, one George Scott was the owner of the north-west quarter of the north-west quarter of said section 22, and that, at that time, it was agreed between him and plaintiff in error, that Scott might dig this ditch, running east and west, with the understanding that, if it did not work properly and carry off the water, plaintiff in error, through whose land it was being constructed, might fill it up; that the ditch did not, and never did, work satisfactorily to plaintiff in error; that the same had for some time been practically abandoned, and allowed to fill up; that Scott told plaintiff in error, that the said ditch did not do him (Scott) any good, and that plaintiff in error could fill the same up, if he wanted to do so. The answer denies that the highway commissioners ever exercised any control over said ditch. The answer admits, that the plaintiff in error told his tenant to plow over and fill up the said ditch. Replication was filed to the answer.

The case was referred to a master in chancery to take testimony; the master took the testimony, and made a report thereon. Upon hearing, the court rendered a decree, finding the facts in the bill to be true, and granting the relief therein prayed. The present writ of error is

sued out for the purpose of reviewing the decree so entered by the circuit court.

ROBERT E. HAMILL, (PALMER, SHUTT, HAMILL & LESTER, and T. D. MINTURN, of counsel,) for plaintiff in error.

ECKHART & MOORE, for defendants in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

*First*—It is claimed on the part of the plaintiff in error, that the court below erred in applying the act of 1889 in relation to drains, approved June 4, 1889, to the issues and evidence in this case. Section 1 of said act of June 4, 1889, provides: “That whenever any ditch or drain, either open or covered, has been heretofore or shall be hereafter constructed by mutual license, consent, or agreement of the owner or owners of adjoining or adjacent lands, either separately or jointly, so as to make a continuous line upon, over, or across the lands of said several owners, \* \* \* then such drains shall be held to be a drain for the mutual benefit of all the lands so interested therein.” (Laws of Ill. 1889, p. 116).

The proof shows that at some time between 1868 and 1871, by an arrangement between one Scott, who owned the north-west quarter of the north-west quarter of section 22, now owned by the defendant in error, Sain; and one Jones, who then owned the east half of the north-west quarter, now owned by the plaintiff in error; and one Peck, who owned the west half of the north-east quarter of said section 22, a ditch or drain was constructed running east and west substantially in the line of the ditch described in the statement preceding this opinion. The testimony leaves it somewhat in doubt, whether the ditch then constructed ran directly east across the premises of Jones, now owned by the plaintiff in error, or whether it ran a little north of an east and west line.

The evidence, however, is clear that, in 1877, Scott, who then owned the north-west quarter of the north-west quarter of section 22, now owned by the defendant in error, Sain, cut a ditch straight across the premises of the plaintiff in error, to connect with the natural draw above referred to, with the consent and by the permission of the plaintiff in error. In cutting the ditch in 1877, Scott varied somewhat from the line of the old ditch dug between 1868 and 1871, but he proceeded substantially upon the same line, upon which the old ditch had been run. Whether the ditch dug by Scott in 1877 was an entirely new ditch, or merely the opening of the old ditch, it was a ditch constructed by the mutual license, consent, and agreement of the owners of the adjoining lands, so as to make a continuous line upon, over, or across their lands. We are, therefore, of the opinion that the act of 1889 is applicable to the issues made by the pleadings and to the proofs introduced in the case.

*Second*—It is claimed on the part of the plaintiff in error, that the court below erred in issuing an injunction, which was mandatory, and not merely preventive, in its character. The decree was, that the plaintiff in error should be enjoined from continuing the obstruction of the ditch on the premises of the plaintiff in error, and from permitting it to remain filled up and obstructed, and that the plaintiff in error should “remove said filling and obstruction of said ditch, so as to restore to said complainants the right to the free flow of the waters through said ditch.”

Undoubtedly, the general rule is, that an injunction is a preventive remedy merely, and cannot be so framed as to command the party to undo what he has done. (*Wangelin v. Goe*, 50 Ill. 459). But it has been said that a court of chancery, by framing the order for injunction in an indirect form, can compel a defendant to restore things to their former condition, and, so, effectuate the same results, as would be obtained by ordering a positive

act to be done. (Kerr on Injunction,—3d Eng. ed.—p. 48). "While the jurisdiction of equity by way of mandatory injunction is rarely exercised, and while its existence has even been questioned, it is nevertheless too firmly established to admit of doubt." (High on Injunctions, sec. 2). A mandatory injunction, commanding the plaintiff to do some positive act, will not be ordered except upon final hearing, and then only to execute the judgment or decree of the court. A mandatory injunction will be issued in cases of obstruction to easements or rights of like nature; and an obstruction will be ordered to be removed, as part of the means of restraining the defendant from interrupting the enjoyment of the said easement or right. (*Rogers Locomotive and Machine Works v. Erie Railway Co.* 5 C. E. Green,—N. J. Eq.—379). In *Earl v. DeHart*, 12 N. J. Eq. 280, an injunction was prayed against the defendants to enjoin and restrain them from permitting the channel of a water-course to remain filled up and obstructed, and from further filling up and obstructing the same; and it was there held, that the complainant was entitled to have the obstruction removed, and that a court of chancery could exercise the power to abate nuisances, as well as to prevent the erection of nuisances, in clear cases.

In *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191, it was held, that equity will interpose by a mandatory injunction to compel the restoration of running water to its natural channel, when wrongfully diverted therefrom, at the suit of the party, whose lands include either the whole or a part of said channel; and that the grounds for equitable interposition in such case are two-fold: First, inadequacy of any legal remedy to secure the party in the enjoyment of his right to have the water flow in its natural channel; and second, to prevent a multiplicity of suits for damages, accruing from the daily and continuous wrongful diversion of the stream.

In *Rothery v. New York Rubber Co.* 90 N. Y. 30, it was held that, where one wrongfully erects and maintains a

dam upon his lands, which sets back the water of the stream upon lands of a neighbor, a judgment is proper, directing the lowering of the dam to such a height, as will abate the nuisance.

High, in his work on Injunctions, (sec. 804,) says: "A mandatory injunction may be granted to compel the restoration of water to its natural channel, which has been wrongfully diverted therefrom." And, in such case, it makes no difference whether the channel dammed up, or from which the water is diverted, is a natural water-course or an artificial ditch. (*Earl v. DeHart, supra*).

In *Wessels v. Colebank*, 174 Ill. 618, we held that the Drainage act of 1889 above referred to operates to convert all parol licenses for ditches and drains, therein provided for, into perpetual easements, where such licenses, have not been revoked within the time limited by the act, that is to say, within one year from the taking effect of the act; and that the act has the effect to make a drain, constructed in the manner therein indicated, an encumbrance upon the lands through which it runs; and that the right to have the ditch maintained, and to have the water flow through it unobstructed, is a permanent one, binding upon the owners of the land and their grantees. The case of *Wessels v. Colebank, supra*, has held that, under the act of 1889, a twenty years' user of a ditch across the land of another is not necessary to the acquirement of the easement.

In the case at bar, the ditch in question was constructed across the premises of the plaintiff in error by the mutual license, consent, and agreement of the owners of the adjoining lands, whether such owners were the former proprietors, Scott, Jones, and Peck, or Scott and plaintiff in error alone. Hence, the right of the defendants in error to have the ditch maintained and to have the water flow through it unobstructed, was, by the act, converted into a perpetual easement, if there was no revocation by the plaintiff in error of the license to make

the ditch, which was given to Scott in 1877. Therefore, the defendants in error, having such perpetual easement, were entitled, under the authorities already quoted, to invoke the interposition of equity by a mandatory injunction ordering the removal of the obstruction. The granting of a mandatory injunction of this character was approved of in *Ribordy v. Murray*, 177 Ill. 134.

*Third*.—It is admitted by the plaintiff in error, that a parol license was granted to Scott in 1877 to construct the ditch in question, or to open the old ditch formerly constructed across the land of plaintiff in error. Section 4 of the act of 1889 provides, that the right to revoke such parol license must be exercised within one year from the time of the taking effect of the act, and, if not thus exercised, and if suit is not brought within said year to enforce the revocation, the party, granting the license, shall be forever barred from thereafter revoking the same.

The evidence does not show, that there was ever at any time any formal revocation by the plaintiff in error of the license, granted to Scott in 1877. Plaintiff in error says, that he permitted Scott to dig the ditch upon condition that, if it did not fulfill the object for which it was constructed, plaintiff in error should have the right to fill it up; and that it did not fulfill such object; and that Scott told the plaintiff in error that the latter could fill it up, if he chose to do so. But no act was done by the plaintiff in error, indicating that he intended to exercise the alleged privilege of filling up the ditch. On the contrary, the evidence shows that, in 1882 or 1883, one or two years before defendant in error, Sain, purchased the property from Scott, or became the owner thereof through Scott, the ditch was repaired, and opened anew, by the owners of the north-east quarter of section 21, lying west of the highway and opposite the westward opening of the ditch. This repairing and opening anew in 1882 or 1883 was done, if not with the affirmative consent of the plaintiff in error, at least with his acquiescence. Sec-

tion 3 of the act of 1889 provides that, whenever drains are constructed in accordance with the act, none of the parties interested therein shall, without the consent of all the parties, fill the same up or obstruct the flow of water therein; and that the license, consent, or agreement of the parties, mentioned in the act, may be inferred from the acquiescence of the parties in the construction of the drain.

If there was a parol agreement between Scott and plaintiff in error, authorizing the latter to revoke the license given to Scott, it was an unexecuted parol agreement, and was never acted upon, so far as is shown by this record. A parol agreement between the owners of the dominant and servient tenements will only operate to extinguish the easement, when such agreement is acted upon; and an unexecuted parol agreement will have no such effect. (10 Am. & Eng. Ency. of Law, —2d ed.—p. 432; Jones on Easements, sec. 847).

The proof does not show clearly an abandonment of the easement by Scott. The burden of proof to show such abandonment is upon the party claiming its existence; and such party must establish the fact by clear and unequivocal evidence. (Jones on Easements, sec. 850).

The evidence is clear, that plaintiff in error took no steps to fill up the ditch until April, 1896, long after the act of 1889 had gone into effect, and long after the period, granted by that act for the revocation of the previous license, had elapsed. The failure to execute, by the filling up of the ditch, the parol agreement, which is alleged to have been made between the plaintiff in error and Scott, warrants the conclusion, that the condition, upon which the agreement was based, did not arise. Nor are the acts of the plaintiff in error, in permitting the ditch to be repaired and improved several years after its construction by Scott, consistent with the claim, that he revoked the parol license given to Scott. The parol agreement, if made, that he might fill up the ditch, was

not valid, inasmuch as it was not filled up until April, 1896, after the defendant in error, Sain, had become the owner of the land formerly owned by Scott, and after the land owners to the west of plaintiff in error, including the highway commissioners, had, for a number of years, exercised the privilege of draining into the ditch. The proof tends to show that the defendant in error, Sain, was allowed by the plaintiff in error to construct tile drains upon his land upon the faith of the license granted by the plaintiff in error to drain through the ditch in question. "A parol license is irrevocable, when the conduct of the licensor has been such that the assertion of the legal title would operate as a fraud upon the licensee." (Jones on Easements, sec. 76).

The decree of the circuit court is affirmed.

*Decree affirmed.*

ERNEST M. TRAVERS

v.

W. A. MC ELVAIN.

*Opinion filed October 19, 1899.*

181	882
194	*451
194	*455
197	*164
197	*166
181	882
s200	877
s200	878
s200	880
181	882
204	*686
206	*586
206	*691
206	*592

1. *LIMITATIONS—proof of compliance with statute must be clear.* Proof of payment of taxes under color of title, as specified in section 7 of the Limitation act, must be clear and convincing when relied upon to defeat the paramount title.

2. *SAME—payment of taxes on vacant lands must be followed by possession.* A plaintiff in ejectment who claims ownership of land, under section 7 of the Limitation act, by payment of taxes for seven successive years upon the property while vacant and unoccupied, must show that after the lapse of seven years he took possession of the premises.

3. *SAME—possession must be taken under color of title.* The taking of possession after payment of seven successive years' taxes, which is necessary to complete the bar of section 7 of the Limitation act, must be by one who, at the time of so taking possession, holds the color of title, either as original owner thereof or as purchaser or grantee. (*Peadro v. Carriger*, 188 Ill. 570, explained.)

4. **SAME**—*what will not constitute the possession required by section 7 of the statute.* Entry upon wild or swamp lands, on one or two occasions, for the purpose of cutting timber to be made into rails, posts and ties, is not such a possession as the law requires of one who has otherwise fulfilled requirements of section 7 of the Limitation act.

APPEAL from the Circuit Court of Hamilton county; the Hon. P. A. PEARCE, Judge, presiding.

This is an action of ejectment, originally brought on April 11, 1896, by the appellant against the appellee and John M. Gibson and Charles M. Morris for the recovery of 160 acres of land, described as the north-west quarter of section 3, township 7, in Hamilton county. On September 29, 1896, a plea of the general issue was filed. A verified plea was also filed by the appellee, denying possession of the south-west quarter of said north-west quarter. Gibson and Morris were in possession of the south-west quarter of the north-west quarter; and the suit was dismissed as to them, and an amended declaration was filed, describing the property sought to be recovered as the north-west quarter of said section 3 except the south-west quarter thereof.

A jury was waived, and the cause was submitted by agreement for trial to the court without a jury. The trial court, after hearing the evidence, made a finding and entered judgment in favor of the defendant below, the appellee here, to which the appellant, the plaintiff below, excepted.

The present appeal is prosecuted from the judgment so entered in favor of the appellee.

WEBB & LANE, and ARTHUR KEITHLEY, for appellant:

The payment of taxes, like the payment of money in discharge of a debt, may be proved by parol evidence although a receipt be given. *Hinchman v. Whetstone*, 23 Ill. 108; *Gage v. Hampton*, 127 id. 87.

It is not essential that the three elements of the bar of the statute,—color of title, payment of taxes and tak-

ing possession,—should all concur through the same person, but one may acquire the color of title and pay the taxes for the required period and then make conveyance to another, to whom all the rights of the grantor will pass, and a third person may, under a contract of purchase from such grantee, enter into possession, and thus the bar of the statute will become complete. *Hale v. Gladfelder*, 52 Ill. 91.

While in an action of ejectment the plaintiff must recover upon the strength of his own title, yet against a mere intruder, who sets up no title in himself or fails to show any title, he need prove only *prima facie* title sufficient to raise a presumption of ownership. *Combs v. Hertig*, 162 Ill. 172.

Actual possession of the land may arise by the use and control of timber land belonging to a farm or homestead, although disconnected therewith, for the ordinary supply of wood or timber for such farm or homestead. *Brooks v. Bruyn*, 18 Ill. 539.

Where a party has title or color of title to wood land, and uses the land for the purpose of obtaining wood for fuel or fencing for a farm in the neighborhood, under claim of ownership, this will constitute possession. *Scott v. Delaney*, 87 Ill. 146.

T. M. ECKLEY, for appellee:

Inasmuch as the payment of taxes under color of title operates to defeat the paramount and all other titles, when relied on the proof must be clear and convincing. Such titles should not be overcome by loose and uncertain testimony or upon mere conjecture or violent presumption. *Hurlbut v. Bradford*, 109 Ill. 397.

It is not enough that the taxes have been actually paid. They must have been paid by or on behalf of the person having color of title, and the burden is on the party claiming under such title to prove the payment by satisfactory evidence. *Timmons v. Kidwell*, 138 Ill. 13.

Notice by possession of the premises, to be sufficient, must be of that open and visible character which, from its nature, is calculated to apprise the world that the property has been appropriated and is occupied; also who the occupant is, or from which the occupant may be readily ascertained; and it must be such a use and occupancy as the property is adapted to. It must be of such a character as to arrest the attention and put a person claiming title upon inquiry. *Truesdale v. Ford*, 37 Ill. 210.

The cutting of timber on unenclosed wild lands, without anything to define the extent of the alleged claim, is not, alone, such evidence of ownership as to amount to possession adverse to the true owner. 1 Am. & Eng. Ency. of Law, 263, note, and case cited.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

In this action the appellant does not seek to recover as owner of the paramount title, but claims to have acquired title under section 7 of the Limitation law, which was section 2 of the act of 1839. (2 Starr & Cur. Ann. Stat. 1547).

It is the doctrine of this court, that, where a plaintiff in an action of ejectment relies for his right of recovery upon section 7 of the present Limitation act of this State, he must not only prove that he had color of title, and that he paid taxes for seven successive years upon the premises while they were vacant and unoccupied, but he must also prove, that, after the lapse of the seven years, he took possession of the premises. (*Gage v. Hampton*, 127 Ill. 87; *McCauley v. Mahon*, 174 id. 384). Whenever the bar of the statute has become absolute by the payment of all taxes legally assessed upon vacant and unoccupied land for seven successive years by a person, having color of title thereto made in good faith, and such person afterwards gets into possession of the land under such title, he has a title which is just as available for attacking

as for defensive purposes. The holder of such title may assert the same, either as a defense, or to regain his possession, if it is invaded.

In the present case, the evidence shows that, on June 16, 1864, a tax deed was executed by the sheriff of Hamilton county, conveying the property in controversy to Aaron G. Cloud. The proof tends to show, that Aaron G. Cloud, having this tax deed as color of title, paid all the taxes upon the premises in question, while the same were vacant and unoccupied, for some nine or ten years. The first payment of taxes by Cloud was made on March 29, 1865, and the last payment was made on June 20, 1874. No tax receipts were produced, showing the payment of taxes, nor was any oral evidence of such payment by the parties, making the same, produced at the trial. Cloud died in 1893. The payment of taxes was sought to be shown by entries upon the collector's books of Hamilton county for the respective years, in which the payments were made. Counsel for appellee criticises the evidence in regard to the payment of taxes as being indefinite and uncertain. The rule is, that proof as to the payment of taxes under color of title must be clear and convincing, as such payment, when relied upon, operates to defeat the paramount title. Paramount title should not be overcome by loose and uncertain testimony, or by mere conjecture, or by violent presumption. (*Hurlbut v. Bradford*, 109 Ill. 397; *Burns v. Edwards*, 163 id. 494).

The entries upon the collector's books do indicate some indefiniteness and uncertainty as to the description of the property, upon which the taxes were paid. It seems to be difficult to determine, from some of these entries, whether the alleged payments were made upon the property here in controversy, or upon property in some other section and township than section 3 and township 7. But we do not deem it necessary to decide in this case, that the appellant's proof in regard to payment of taxes for seven successive years was insufficient to establish

such payment. It may be conceded, for the purposes of this case, that the evidence in regard to the payment of taxes was sufficient.

It was, however, necessary for the plaintiff to show, that, after the bar of the statute had become complete by the payment of taxes for seven successive years upon the land while it was vacant and unoccupied, the holder of the color of title then took possession of the land. The plaintiff was not entitled to recover, unless he showed possession taken after the previous accruing of the bar. We do not think that the evidence in the record shows, that such possession as the statute contemplates was taken after the lapse of the seven years.

There are several well established rules as to what constitutes possession, which may be applied to the facts of this case in order to determine whether the acts of possession, set up by the appellant, constituted such possession as the law requires. The land must be appropriated to individual use in such a manner as to apprise the community or neighborhood, that it is in the exclusive use and enjoyment of the person so appropriating it. The possession of land may be acquired by any use, which clearly indicates an appropriation by the person who claims to hold the property. (*Gage v. Hampton, supra*). The possession should be of such open and visible character as to apprise the world, that the property has been appropriated, and is occupied. It must also be of such a character as to indicate who the occupant is, and it must be consistent with such use and occupancy as the property is suited for, or adapted to. The occupancy must be exclusive. If the possession is only used and enjoyed in common with others, or the public in general, it cannot be regarded as hostile to other persons claiming title. Its character must be such as to arrest attention, and put other persons claiming title upon inquiry. Such possession cannot be made out by inference, but only by clear and positive proof. (*Truesdale v. Ford*, 37 Ill. 210;

*McClellan v. Kellogg*, 17 id. 498; *Downing v. Mayes*, 153 id. 330; *Davis v. Howard*, 172 id. 340.) In *Gage v. Hampton, supra*, we said: "Possession of land may be acquired and held in different modes, by enclosure, by cultivation, by the erection of buildings, or other improvements, or, in fact, by any use that clearly indicates an appropriation to the use of the person claiming to hold the property." (*Truesdale v. Ford*, 37 Ill. 210).

Cloud, the holder of the color of title, who paid taxes on the land for seven successive years while it was vacant and unoccupied, never took possession at all. This is conceded by appellant. In 1875 Cloud conveyed the premises to Quackenbush and Duncan, who, in 1878, conveyed the same to one Whitley. In the same year, Whitley conveyed them to Luther, who conveyed them to one Hunter in 1879. On April 27, 1883, Hunter conveyed the same to Thomas H. Travers, an uncle of the present appellant. On July 6, 1883, Thomas H. Travers conveyed the premises to his nephew, the present appellant, Ernest M. Travers. So far as the record shows, no taxes were paid upon the premises by any of the parties holding under Cloud from 1875 to July 6, 1883, when the appellant obtained his deed. The proof is clear and uncontradicted, that down to April 27, 1883, when Thomas H. Travers obtained his deed, the premises were vacant and unoccupied. They were what were known as "wild" or "swamp" lands.

The testimony shows, that, in May, 1883, Thomas H. Travers made an arrangement with Thomas Porter, who lived about three-quarters of a mile from these premises, by which Porter agreed to keep trespassers from cutting timber from the land, and, in consideration thereof, Thomas H. Travers gave Thomas Porter permission to cut such timber therefrom as he himself should want. On one or two occasions Thomas Porter warned parties, trespassing upon the land by cutting timber therefrom, to cease doing so, saying, at the time, that he was the agent for the owner of the land. The proof also shows,

that, on one occasion, Thomas Porter found some ties on the land, which had been left there, and hauled the same away and sold them. The proof further shows that one H. W. Porter, a nephew of Thomas Porter, was upon one occasion employed by the latter to cut some timber on the land, and saw it into logs, and make rails and posts and ties out of the same. He did so, and hauled the posts, rails and ties away and sold the same. The testimony, however, is quite clear, that even these few acts, performed in behalf of Thomas Travers, and consisting of sawing logs, and making posts and ties and hauling the same away, were performed in the year 1884. This was after Thomas H. Travers had parted with his title, which he only held for a little more than two months, to-wit, from April 27 to July 6, 1883.

The acts thus referred to, and amounting to nothing more than cutting timber from the land on one or two occasions, are the acts which are urged upon our attention as constituting possession. If the cutting of timber in the manner thus indicated could be held to be such possession as the statute requires, it is quite clear that it was only done by, or in behalf of, Thomas H. Travers; and it was so done after Travers had deeded the property to his nephew, the present appellant, and thereby ceased to be the holder of the color of title. Under section 7 of the Limitation act, possession, after the accruing of the bar, must be taken by the holder of the color of title. Color of title and possession must concur in the same person. Section 7 of the Limitation act provides, that "all persons holding under such tax-payer by purchase, devise, or descent, before the seven years shall have expired, and who shall continue to pay the taxes, as aforesaid, so as to complete the payment of taxes for the term aforesaid, shall be entitled to the benefit of this section." (2 Starr & Cur. Stat. 1548). What is said in regard to section 7 in *Peadro v. Carriker*, 168 Ill. 570, must be read in the light of the clause thus quoted from said section 7.

But while it may have not been necessary for Cloud, after paying the taxes while holding the color of title, to take possession of the property himself in order to secure the benefit of the bar as an attacking force, yet it was necessary for some purchaser from him, or some grantee holding under him, to take possession while holding the color of title. It is not claimed that the present appellant took possession. Possession is claimed to have been taken by Thomas H. Travers; and, to be of any avail, it must have been taken while he held the color of title, but such was not the fact.

But, even if the acts performed by Thomas H. Travers, which are alleged to constitute possession, had been performed while he held the color of title, we do not think that they amounted to such possession as the law contemplates. "The cutting of timber on unenclosed wild lands, without anything to define the extent of the alleged claim, is not alone such evidence of ownership as to amount to possession adverse to the true owner." (1 Am. & Eng. Ency. of Law, p. 263; *Childress v. Calloway*, 76 Ala. 128; *Clements v. Hayes*, id. 280; *Bucks v. Mitchell*, 78 id. 61; *Parker v. Parker*, 1 Allen, 245; *Hale v. Gliddon*, 10 N.H. 297). The evidence is conclusive, in the case at bar, that none of the lands here in controversy were ever enclosed by a fence or otherwise, or put under cultivation, nor were any buildings, or other improvements of any sort, erected thereon at any time prior to 1891, when the appellee herein acquired the paramount title to the premises in question, and took possession thereof.

In *Harms v. Kransz*, 167 Ill. 421, we said: "The mere cutting of fire-wood upon land occupied by other persons and moving it off do not constitute such occupation as is contemplated by the statute." (*Drake v. Ogden*, 128 Ill. 608; *Hammond v. Carter*, 155 id. 579). We see no difference between the cutting of timber on wild and swamp lands for the purpose of using it for fire-wood, and cutting such timber for the purpose of making it into rails and posts

and ties, where the cutting is only done upon one or two occasions. In *Harms v. Kransz, supra*, we said, that, in most of the cases where the cutting of timber upon land had been held to indicate an adverse possession thereof, there had been improvements upon the land at the time such acts were performed; and the case of *Tucker v. Shaw*, 158 Ill. 326, was instanced as a case, where, although the party claiming to be in possession cut and hauled timber from swamp lands, and sold it to others to be converted into rails and posts and sawed lumber, it yet appeared that improvements had been made upon the land by way of building a dwelling, and clearing and fencing a certain number of acres. In the case at bar, the premises in question were not only not fenced or improved by the erection of any dwelling, but no part thereof was cleared, except so far as the cutting of timber on one or two occasions constituted a clearing.

The lands in question are described by all the witnesses as having been swamp and wild lands, which were used by anybody in that neighborhood who needed or desired timber. Many witnesses, who lived in the neighborhood for years, and lived there at the time when Thomas H. Travers held his color of title, say that no possession was taken, nor were any acts of ownership performed by Travers or anybody else to indicate to them that the lands were occupied, or had been appropriated by any person. Our conclusion is, that the proof does not show such a possession as the law requires, and, that, for this reason, the decision of the court below in favor of the defendant was correct. It is unnecessary to pass any opinion upon the validity of the title of the appellee, who was the defendant below, as it is well settled, that the plaintiff in an ejectment suit must recover upon the strength of his own title, and not upon the weakness of the title of his adversary.

The judgment of the circuit court of Hamilton county is affirmed.

*Judgment affirmed.*

## THE KNAPP, STOUT &amp; Co. COMPANY

v.

CHARLES F. ROSS, Receiver.

*Opinion filed October 19, 1899.*

1. PLEADING—*general demurrer should not be sustained if part of the counts are good.* A general demurrer to a declaration containing common and special counts is properly overruled when the common counts are good, although the special counts may be bad.

2. APPEALS AND ERRORS—*judgment of Appellate Court—when not final and appealable.* A judgment of the Appellate Court reversing the judgment of the trial court and remanding the cause “for such other and further proceedings as to law and justice shall appertain,” is not a final judgment from which an appeal will lie to the Supreme Court.

*Ross v. Knapp, Stout & Co.* 77 Ill. App. 424, appeal dismissed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on writ of error to the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding.

WISE & McNULTY, for appellant.

C. W. GREENFIELD, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This is an action of assumpsit, brought in the city court of East St. Louis, by the appellee against the appellant. The declaration consists of seven special counts and the common counts. The defendant below, the appellant here, filed a general demurrer to the declaration. The city court sustained the demurrer, and entered judgment for costs against the plaintiff below, who is the present appellee.

Charles F. Ross, receiver, etc., the present appellee, took the case by writ of error to the Appellate Court. The Appellate Court reversed the judgment of the city

court, and ordered that Charles F. Ross, receiver, etc., plaintiff in error in the Appellate Court and appellee here, should recover of Knapp, Stout & Co. Company, defendant in error in the Appellate Court and appellant here, the costs.

The present appeal is prosecuted from the judgment of the Appellate Court reversing the judgment of the city court, which sustained the demurrer to the declaration and dismissed the suit at the costs of plaintiff below.

The Appellate Court took the view, that the declaration filed in the trial court set up a good cause of action, and that the demurrer thereto should have been overruled. Upon one ground, if upon no other, the judgment of the Appellate Court, reversing the judgment of the city court, was correct. The declaration consisted of seven special counts and, also, of the common counts; and the demurrer was general, and to the whole declaration, including both the special counts and the common counts. As the common counts were good, even though the special counts may have been bad, the trial court erred in sustaining the demurrer to the whole declaration.

It is well settled that, where a declaration contains several counts, and one of the counts is good, a general demurrer to the declaration will not be sustained, even if the other counts are bad. (*Henrickson v. Reinback*, 33 Ill. 299). On a general demurrer to a declaration containing several counts, the demurrer must be overruled, if there is one good count. (*Farmers' and Merchants' Ins. Co. v. Menz*, 63 Ill. 116). In *Barber v. Whitney*, 29 Ill. 439, we said: "This declaration contained special and the common counts in the usual form. To this declaration the defendant filed a general demurrer, which the court overruled, and very properly. Even if the special counts were faulty, the common counts were undoubtedly good, and, as the demurrer was to the whole declaration, there was nothing which the court could properly do but overrule it." Again, in *Nickerson v. Sheldon*, 33 Ill. 372, we said: "The common

counts being good, whatever may be the character of the special count, the demurrer had to be overruled."

It follows, that the city court erred in sustaining the demurrer to the declaration, and in not overruling it. Therefore, the judgment of the Appellate Court was technically correct in reversing the judgment of the city court. Counsel, however, claim that the question, presented by the special counts of the declaration, is of such importance that the court should pass upon it, notwithstanding the error committed by the city court in sustaining the demurrer to the whole declaration. Even if we were disposed to overlook the error thus committed, and to consider the question whether or not the special counts of the declaration presented a good cause of action, the present appeal to this court must be dismissed for the reason hereinafter stated. The result will be the same to the present appellant, whether the judgment of the Appellate Court is affirmed, or the present appeal is dismissed. The judgment of the Appellate Court will stand as a judgment reversing the judgment of the city court if the appeal from it to this court is dismissed, and it would equally stand as such judgment, if this court should affirm it.

We are, however, of the opinion that we have no jurisdiction to entertain the appeal from the judgment rendered by the Appellate Court. That judgment reversed the judgment of the city court, and ordered that "the cause be remanded to the city court of East St. Louis for such other and further proceedings as to law and justice shall appertain."

The judgment of the Appellate Court, which thus reverses the judgment of the trial court, and remands the "cause for such other and further proceedings as to law and justice shall appertain," is not a final judgment; nor is it such a judgment that no further proceedings can be had in the court below except to carry into effect the mandate of the Appellate Court. There is no appeal from a judgment of this character to the Supreme Court of the

State. Where the judgment of the circuit court is by the Appellate Court "reversed, and the cause remanded to the circuit court for such other and further proceedings as to law and justice shall appertain," no appeal lies from the Appellate Court to the Supreme Court to review such judgment of the Appellate Court, it being in no sense a final judgment. (*Buck v. County of Hamilton*, 99 Ill. 507; *Anderson v. Fruitt*, 108 id. 378; *Trustees of Schools v. Potter*, id. 433; *Fanning v. Rogerson*, 142 id. 478; *Henning v. Eldridge*, 146 id. 305; *Gade v. Forest Glen Brick Co.* 158 id. 89). In *Henning v. Eldridge, supra*, we said: "When the judgment of an inferior court is reversed, and the cause remanded for other and further proceedings as to law and justice shall appertain—that is, remanded generally—the judgment of the Appellate Court is not a final judgment, from which an appeal or writ of error will lie to this court." It is manifest that, when the judgment was reversed by the Appellate Court and the cause was remanded to the trial court, it would be the duty of the trial court, upon the re-instatement of the cause therein, to overrule the demurrer to the declaration; and in that case, the defendant below, the present appellant, could either stand by its demurrer and let judgment go against it, or plead to the declaration, and go to trial upon the merits. In either case, something more remains to be done by the lower court, than merely to carry into effect the judgment or mandate of the Appellate Court. Necessarily, therefore, the judgment of the Appellate Court was not such a final judgment as that the appeal would lie from it to this court. Accordingly, the present appeal is dismissed for want of jurisdiction in this court to entertain it.

*Appeal dismissed.*

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THE CITY OF ALTON  
*v.*  
BENJAMIN FISHBACK, Exr.

*Opinion filed October 16, 1899.*

1. **PLATS**—under the *Revised Statutes of 1845* each proprietor was required to acknowledge plat. An attempted dedication of land to a city under the *Revised Statutes of 1845* (chap. 25, p. 115,) is ineffectual when the plat was not personally acknowledged by each of the proprietors, in accordance with section 20 of such act.

2. **DEDICATION**—when absence of consent of mortgagee vitiates dedication. A dedication of property by a mortgagor for a public use, without the co-operation or consent of the mortgagee, fails where the latter acquires title to the premises upon foreclosure.

3. **ESTOPPEL**—when owner is not estopped to deny validity of statutory dedication. The owner of land is not estopped to deny the validity of a statutory dedication for highway purposes by the acts of those from whom she derived title, when they did not consent to the platting of the street or recognize it as platted, although they made a common law dedication of a highway, which did not include the strip in controversy, which was not accepted or opened by the city.

4. **DAMAGES**—verdict of \$100 in trespass against city for removing fence held not excessive. Damages of \$100 awarded a property owner for trespass are not excessive, where sixty feet of his fence was taken down by the city and a sidewalk constructed three and one-half feet within its line, to the injury of trees and the grounds.

WRIT OF ERROR to the Circuit Court of Madison county; the Hon. WILLIAM HARTZELL, Judge, presiding.

L. D. YAGER, and HENRY S. BAKER, for plaintiff in error.

DUNNEGAN & LEVERETT, for defendant in error.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an action of trespass brought by Mrs. Ottillia H. Fishback in the Madison circuit court, against the city of Alton. The injury complained of is the tearing down and removal of her fence, destroying trees and dig-

ging up her grounds. A trial was had by jury upon the pleas of not guilty and *liberum tenementum*, resulting in a judgment for the plaintiff for \$100 and costs of suit. To reverse that judgment this writ of error is prosecuted.

There is no substantial controversy between the parties as to the facts. The plaintiff is the owner of lands bordering on the east side of Washington street, in the city of Alton, which city by ordinance had provided for laying a sidewalk in front of her property. The contractor putting down the walk, acting under the direction of the city engineer, determined that her fence was in the street, and having notified her husband to remove it, and it not being done, he, the contractor, took down some sixty feet of the fence and placed the sidewalk about three and a half feet upon the land which had been enclosed by the fence.

Under its plea of *liberum tenementum* the city insisted upon the trial, and now contends, that the *locus in quo* was a part of the public street, and therefore it legally tore down and removed the fence. It is admitted by the brief and argument in this case that plaintiff made out a *prima facie* case against the defendant, and if the sidewalk was not built within the limits of Washington street the trespass was committed as alleged, and it is said "the ultimate question, therefore, before this court is, was the sidewalk laid within the limits of Washington street."

It is shown by the evidence on behalf of plaintiff, and not questioned by the defendant, that the fence taken down and removed had been in that place for more than thirty years, and there is no claim that the strip of ground enclosed by that fence had ever been actually used as a part of the street. The city, in support of its plea that it was legally a part of the street, relies solely upon a dedication by William Manning, John Higham and Robert Smith, platting an addition to Alton. That plat, which was introduced in evidence, purports to have been made by these parties November 20, 1835. It is

conceded that prior to that time William Manning had executed and delivered a mortgage upon his part of the land to one Russell, which was in force at the time of the addition, and that Russell was neither a party to nor consented to the dedication, but that he afterwards foreclosed his mortgage and acquired title thereby to the premises, a part of which is the strip here in controversy. The attempted dedication was made under the statute then in force, found in the Revised Statutes of 1845. (Chap. 25, p. 115.) Section 17 of that statute provides that in making the plat or map the parties shall cause the premises to be surveyed by the county surveyor (if there be one) of the county in which the town or addition is situated, and if not, then by the county surveyor of an adjacent county. The only certificate attached to the plat offered in evidence is signed "Deniah Robinson, S. M. C., by Joseph Burnap, deputy."

It is objected on the part of defendant in error that there is nothing here to show that the certificate was made by the county surveyor of any county. If this were the only objection to the validity of the plat we might indulge the presumption that the letters following the name of Robinson mean "surveyor of Madison county," as is claimed by counsel for plaintiff in error. But a more substantial, and, we think, fatal, objection to the plat is found in the fact that the certificate of acknowledgment attached thereto shows that William Manning, Jr., one of the proprietors, did not acknowledge the same, the certificate being, "William Manning, Jr., by Robert Smith, his attorney," etc. The statute above referred to (section 20) provides that "before offering such plat or map for record the parties making the same shall acknowledge it," etc., and we have held that unless that acknowledgment is made by the party or parties in their own proper person the plat is invalid. (*Gosselin v. City of Chicago*, 103 Ill. 623, followed by *Earll v. City of Chicago*, 136 Ill. 277.) It is, in fact, conceded that if this plat had

been made by William Manning, Jr., alone, the objection to the acknowledgment would be fatal; but an attempt is made to escape that conclusion by urging that inasmuch as the plat is made by three parties, the other two properly acknowledging it, the defect as to Manning is cured. This position is wholly untenable. The act of dedication was the joint act of the three parties, and to be valid as a transfer of their title it must have been executed in conformity with the requirements of the statute by each of them. Again, it is clear that the attempted dedication upon the part of William Manning, without the co-operation or consent of his mortgagee, Russell, was invalid. We said in *Gridley v. Hopkins*, 84 Ill. 528: "A dedication of property for public use is in the nature of a conveyance for the purposes of the use, but a person can convey or donate no more or greater title than he holds. If he has no title or his title is conditional, and it fails, the dedication fails." This language was quoted with approval in *Elson v. Comstock*, 150 Ill. 303.

It is contended that, notwithstanding this defect upon the face of the proceeding, plaintiff below was estopped to deny the validity of the statutory dedication by the acts of the mortgagee and his grantee, her father, from whom she derived title; and for this position reliance is placed upon the case of *Smith v. Heath*, 102 Ill. 130. The facts of that case bear no resemblance to those in the case at bar. Here there was no consent on the part of the mortgagee that the property might be platted, nor did the conveyance to plaintiff's father, made in pursuance of the decree of foreclosure, in any way refer to Washington street or the alleged plat. Nor is there any evidence of affirmative acts on the part of plaintiff or her father from which it can be said they recognized the street as platted. There was doubtless a good common law dedication on the part of the father, but that dedication did not extend to or include the strip of land here in controversy. On the contrary, it was never open to

public travel, much less accepted by the city and used as a part of the street.

We think the city wholly failed to make out the defense that the plaintiff's fence, and the ground taken by the city for a sidewalk, were a part of the public street. We are also of the opinion that there is no substantial ground for the insistence that the damages awarded by the jury were excessive. No complaint whatever is made of the rulings of the trial court upon the admission or exclusion of evidence or in giving or refusing instructions. The damages awarded were authorized by the proofs.

On the whole record we find no reversible error, and the judgment of the circuit court is affirmed.

*Judgment affirmed.*

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CARL NIEMAN *et al.*

*v.*

WILHELMINA SCHNITKER.

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*Opinion filed October 16, 1899.*

1. EVIDENCE—*former similar wills are admissible on contest on question of sanity.* Former wills, made when the testator's sanity was not questioned, which dispose of the testator's property in substantially the same way as the contested will, are competent evidence on the question of testamentary capacity; and proof of the testator's sanity when executing such former wills is also competent.

2. INSTRUCTIONS—*instruction as to the weight of testimony is erroneous.* An instruction which impliedly suggests to the jury that some other witness had a better opportunity of observing the deceased than the subscribing witnesses to a will, and that his testimony is entitled to greater weight, invades the province of the jury.

3. WILLS—*partial unsoundness of mind does not necessarily destroy testamentary capacity.* Feebleness or partial unsoundness of mind does not deprive a person of testamentary capacity, if he knows and understands what disposition he desires to make of his property and upon whom he will bestow his bounty.

4. SAME—*instructions on question of insanity should be based on the evidence.* An instruction that if the will offered for probate was made under the influence of partial insanity it is invalid is misleading, in the absence of any evidence upon which to found it.

5. SAME—*instruction in will contest held to be erroneous.* On a will contest an instruction that a testator may have upon some subjects, and even generally, mind, memory and sense to know and comprehend ordinary transactions, and yet be of unsound mind upon the subject of those who would naturally be the objects of his bounty and of what would be a reasonable and proper disposition of his property as to them, is erroneous.

APPEAL from the Circuit Court of Washington county; the Hon. B. R. BURROUGHS, Judge, presiding.

JAMES A. WATTS, for appellants.

CHARLES T. MOORE, F. P. TSCHARNER, and F. M. VERNOR, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

The will of Henry Nieman was admitted to probate in the county court of Washington county on the 6th day of August, 1898, and on the 28th day of September, 1898, this bill was filed to contest the validity of the will, on the sole ground, as alleged in the bill, of want of testamentary capacity.

The evidence shows that on May 24, 1898, the testator made his will, which was duly witnessed by Prof. Fassbender and Fred Hoffman, who testified that at the time of the execution he was of sound and disposing mind. The evidence shows that the town assessor called on him the same day, and the testator made his personal property schedule,—*i. e.*, the schedule of his individual property and of property held by him as guardian,—giving a description and statement of the property from recollection. Some twelve witnesses who saw the testator before and after this will was signed, within a short time

of that event, and who had known him for a number of years, testified to having conversations with him and of observing his manner and condition, and their evidence tends to show that he was of sound and disposing mind. On the 29th day of May he took the sacrament, and the preacher who administered the sacrament testified that he would not take part in that religious ordinance with one not of sound mind; that he conversed with the testator for the purpose of learning of his condition of mind, and states that in his opinion he was of sound mind. Another witness testifies that ten days before the execution of the will the testator stated that he intended to will the appellants here just what he did give to them. Six or seven witnesses called by the contestant, among them the attending physician, testify that about the time of the execution of the will they had conversations with and observed the condition of the testator, and that in their opinion he was not of sound mind. Others called by the contestant, who shortly prior and shortly after the execution of the will conversed with the testator, testify that at times he knew and at other times he did not know of what he was speaking. Other witnesses were called both by proponents and contestant, who testified to certain acts and conversations with the testator, both prior and subsequent to the execution of the will, but expressed no opinion as to the soundness or unsoundness of his mind. Without expressing any opinion as to the weight of evidence in this case, it is sufficient to say that the evidence is sharply conflicting.

The testator, at the time of his death, on June 19, 1898, was about seventy-nine years of age. He had made three or more wills,—one of date August 17, 1897, one of date April 23, 1898, and the one sought to be contested, May 24, 1898. The two former wills were offered in evidence and were objected to by the contestant and the objections were sustained, to which the proponents excepted. Numerous instructions were submitted to the jury on

behalf of contestant and proponents, to which, respectively, exceptions were taken. The jury found that the instrument purporting to be the last will of Henry Nieman was not his last will and testament, and the court entered a decree accordingly. Error is assigned to the admission and exclusion of evidence, in giving and refusing instructions, in entering the decree and overruling the motion for a new trial, etc.

From what appears in this record we are compelled to reverse this decree, and inasmuch as the case must go before another jury we refrain from expressing any opinion on the evidence and as to which side has a preponderance.

The declarations and statements of a testator, made, both or either, before or after the execution of his will, may be proved for the purpose of showing his mental condition at the time of the execution of the will. (*Craig v. Southard*, 148 Ill. 37; *Petefish v. Becker*, 176 id. 448; *Hill v. Bahrns*, 158 id. 314; *Taylor v. Pegram*, 151 id. 106.) And where the testator has made previous wills, his declarations and statements made about the time of the execution of those former wills, upon the subject of or manner in which he had therein disposed of his property, have been held to be competent evidence. (*Taylor v. Pegram, supra*.) Where a previous will has been made at a time when the soundness of mind of the testator is unquestioned, and the disposition of property as made by such previous will is approximately the same as made by a will sought to be contested on the ground of unsoundness of mind, such previous will so approximately disposing of property when such soundness of mind is unquestioned is the strongest character of evidence to show a condition of soundness of mind at the time the contested will was made. The wills sought to be offered in evidence, objections to which were sustained by the court, approximately disposed of the property of the testator in the same way as the contested will, and the declarations of

the testator made prior to the execution of the contested will show a purposed change of the will for the correction of minor errors and mistakes appearing in the will. Such former wills are a stronger character of evidence than the mere declarations and statements of a testator, made at about the time of their execution, as to their contents and as to their purpose, depending on the mere recollection of witnesses. The condition of mind of the testator at the time of making such former wills might be properly proved, and when such evidence shows him to have been of sound mind at that time, and where there has been but slight change in the disposition of his property under the former wills and under the contested will, such former wills furnish exceedingly strong evidence of the mental soundness of the testator at the time of the execution of the contested will. Proof of the mental soundness of the testator at the time of the execution of such former wills was competent evidence, as were also the wills themselves. The court erred in excluding testimony as to the mental soundness of the testator at the time of the execution of such former will, and in excluding the wills themselves.

The first instruction given for the contestant was to the effect that the mere fact that a person is a subscribing witness to a will does not entitle his opinion as to the competency of the testator to execute the same, to any more weight than the opinion of any other witness equally credible and intelligent and with equal opportunities of judging, and "his testimony may not be entitled to as much weight as that of some other witness who had better opportunities of observing the deceased at or about the time the will was executed." There is nothing in the record showing that any other witness than the subscribing witnesses was present at the time of the execution of the will, nor is there evidence showing there were other witnesses who had better opportunities of observing the deceased at that time. The question

of the weight of the testimony of the witnesses is a question to be determined by the jury, and their province should not be invaded by the court, as is done by this instruction, where it is stated that the testimony of the subscribing witnesses is not entitled to as much weight as that of some other witness who had better opportunities of observing the deceased. Whether there were any other witnesses who had better opportunities of observing the deceased, and the weight of their testimony, were both questions for the jury and not for the court, and this instruction impliedly suggests to the jury that some other witness or witnesses had better opportunity of observing the deceased than the subscribing witnesses. It was error to give this instruction. *Brown v. Riggan*, 94 Ill. 560.

It was error to give the fourth instruction for contestant, which is as follows:

"Unsoundness of mind embraces every species of mental incapacity, from raging mania to that delicate and extreme feebleness of mind which approaches near and degenerates into unconsciousness."

The mind of a testator may be affected in a degree and may be in a partial sense unsound, but, as a matter of law, that alone would not incapacitate him from making a valid will if he yet possesses the capacity to know and understand what disposition he will make of his property and upon whom he will bestow his bounty. (*Freeman v. Easly*, 117 Ill. 317.) The instruction as given would take away from a testator who is feeble from sickness but who possesses capacity to know and understand what disposition he desires to make of his property, the right to do so as a matter of law, if every species of mental incapacity, from raging mania to delicate and extreme feebleness of mind which approaches near to and degenerates into unconsciousness, constitutes want of testamentary capacity. The instruction ignores the extent of the unsoundness of mind, because, in effect, it states "every species of mental incapacity" is embraced

in the term "unsoundness of mind." This states the rule of law broader than warranted by the authorities of this State. It was error to give this instruction.

The fifth instruction given for the contestant was as follows:

"The law recognizes the difference between general and partial insanity, and if the jury believe, from the evidence, that the will offered was made under the influence of partial insanity and is the product of it, it is as invalid as if made under the effects of insanity ever so general."

There was no evidence in the record tending to show that there existed any delusion in the mind of the testator as to any particular matter or a mania on any particular subject. The evidence can only be considered as presenting the question as to whether the condition of mind was occasioned by senility or softening of the brain. The instruction suggests what was not suggested by the evidence,—that the will offered was made under the influence of partial insanity,—and in this respect the instruction was misleading. As held in *Chambers v. People*, 105 Ill. 409 (on p. 418): "The fact that the court assumes to state the law applicable to particular states of case is of itself an assumption that those states of case exist, for it is not to be presumed a court would give the law to a jury while trying a case, with reference to questions not believed to be before them." In the absence of evidence as to any delusion or mania there was no basis on which the jury could find that the will was made under the evidence of partial insanity, and it was error to give this instruction.

The seventh instruction given for the contestant is as follows:

"That a person may have upon some subjects, and even generally, mind and memory and sense to know and comprehend ordinary transactions, and yet upon the subject of those who would naturally be the objects of his care

and bounty, and of a reasonable and proper disposition as to them of his estate, he may be of unsound mind."

It is not the province of the jury to determine whether the will is a just, wise and proper disposition of the testator's property. (*Carpenter v. Calvert*, 83 Ill. 62.) In *Freeman v. Easly, supra*, this court said (p. 321): "In this case the testator suffered greatly from severe bodily disease, and no doubt his mind was affected to a degree it might be, at least in a partial sense, unsound; but the jury should not, for that reason alone, be told, as a matter of law, that would incapacitate him to make a valid will. That would be to state the rule of law on this subject broader than the authorities in this and other States will warrant. \* \* \* It accords with common observation that in contests concerning wills, where the testator has made, or has seemingly made, an unequal or inequitable disposition of his property among those occupying the same relation to him, by consanguinity or otherwise, there is a disposition in most minds to seek for a cause for holding the will invalid. The inclination in this direction that is found to exist in the minds of most, if not all, jurors, cannot always be controlled by instructing them there is no law requiring a testator, nor is he bound, to devise his property equitably or in equal proportions among his heirs. Of course, the law is he may make such disposition of his property as he sees fit, and he may bestow his bounty where he wishes, either upon his heirs or others. While this is undoubtedly the law, the common mind is disinclined to recognize it, and jurors will too frequently seize upon any pretext for finding a verdict in accordance with what they regard as natural justice." This instruction is much more vicious than the one to which the foregoing language was applied, and is, of itself, sufficient on which to base a reversal of this case.

For the errors indicated the judgment must be reversed and the cause remanded.

*Reversed and remanded.*

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## FRANK ERVINGTON

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

*Opinion filed October 19, 1899.*

INDICTMENT—an indictment for felony must charge "felonious" intent. An indictment for an assault with intent to murder is insufficient where it fails to charge that the assault was made feloniously.

WRIT OF ERROR to the Circuit Court of Champaign county; the Hon. FRANCIS M. WRIGHT, Judge, presiding.

F. M. GREEN & SON, for plaintiff in error.

E. C. AKIN, Attorney General, and A. J. MILLER, State's Attorney, for the People.

Mr. JUSTICE CRAIG delivered the opinion of the court:

The plaintiff in error, Frank Ervington, was indicted by the grand jury of Champaign county for an assault with intent to murder. The indictment contained two counts. In the first it was charged "that Frank Ervington, late of said county and State, on the tenth day of May, in the year of our Lord one thousand eight hundred and ninety-eight, at and in the county and State aforesaid, with a deadly weapon, a knife, which the said Frank Ervington held in his hand, did unlawfully and willfully make an assault in and upon John Scott, in the peace of the people then and there being, with an intent then and there unlawfully, willfully and maliciously to murder him, the said John Scott, a human being, contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of Illinois." In the second count it was charged "that Frank Ervington, late of the county of Champaign and State aforesaid, on the tenth day of May, in the year of

our Lord one thousand eight hundred and ninety-eight, at and in the county aforesaid, with a deadly weapon, a knife, which the said Frank Ervington held in his hand, did unlawfully and willfully make an assault in and upon John Scott, in the peace of the people then and there being, with an intent then and there unlawfully, willfully and maliciously to murder him, the said John Scott, a human being, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the said People of the State of Illinois." On the trial the defendant was found guilty as charged in the indictment. The court overruled a motion for a new trial and in arrest of judgment, and sentenced the defendant to the penitentiary.

On the motion in arrest of judgment the plaintiff in error assigned as a ground for the motion that the indictment, and each and every count therein, is insufficient in law, and fails to substantially charge the defendant with the crime of assault with intent to commit murder, in words sufficient in law. The specific objection urged to the indictment is, that it contains no allegation that the assault upon John Scott was made feloniously. At an early day in this State the question presented arose in *Curtis v. People*, 1 Scam. 285, and the court held that in an indictment for an assault with intent to murder, like the indictment here involved, it was necessary to charge that the act was feloniously done. In the decision of the question it was said: "Curtis was indicted for an assault with intent, of his malice aforethought, to kill and murder, but the indictment does not charge the act to have been done feloniously. \* \* \* The only point necessary to be decided is whether the indictment is sufficient. In the case of *Curtis v. People*, Breese, 256, this very point was made, and it was held that it was necessary 'that the intent should not only be charged to be in itself malicious and unlawful, but that the felonious design and extent of the crime intended to be perpetrated should be distinctly

set forth, otherwise the inference would be that the assault might be excusable or justifiable.' For this defect in the indictment the judgment below must be reversed." In *Curtis v. People*, Breese, 256, on an indictment for an assault with intent to murder, it was held indispensable that the intent should be alleged to be unlawful and felonious. In 1 Chitty on Criminal Law (sec. 242) the author says that every indictment for treason must contain the word "traitorously," every indictment for burglary "burglariously," and "feloniously" must be introduced in every indictment for felony. In Moore on Criminal Law it is said (sec. 790): "Unless the statute has changed the common law, the word 'feloniously' must be used in all cases of felony at common law or made felony by statute, and if this word be omitted in a charge for carrying away grain, the offense will be trespass. But in cases of misdemeanor the use of the word 'feloniously' is unnecessary in charging the offense, though it does not vitiate the indictment." At common law the rule seems to have been general, in charging the crime, to allege the intention as felonious. 1 Bishop on Crim. Law, 698; 1 Wharton on Am. Crim. Law, 1283-1287; 1 Bishop on Crim. Proc. sec. 534.

The offense for which the defendant was indicted was a felony, and we are of opinion that the law required the indictment to allege that the act was done feloniously. Some States have adopted a different rule, but we regard the rule heretofore adopted in this State as the better one, and one, too, sustained by the weight of authority. We are therefore of opinion that the court erred in refusing to arrest the judgment, and upon that ground the judgment will be reversed and the cause remanded.

*Reversed and remanded.*

## WILLIAM FITZGERALD

v.

## JAMES LORENZ.

*Opinion filed October 19, 1899.*

1. PLEADING—when averment of rate of interest is not at variance with legal effect of note. An averment in a declaration that notes were payable “with interest at six per cent per annum,” is in accordance with the legal effect of a note which reads “interest at six per,” so that the irregularity of an amendment made at trial, conforming the pleading to the proof, is immaterial.

2. SAME—when amendment sufficiently indicates the part of the declaration amended. An amendment to be inserted in each count of the declaration after a specified word, and as a substitute for certain other words which appear but once in each count, is sufficiently plain as to what part of the declaration is to be amended.

3. EVIDENCE—proof of interest “at six per” warrants finding of six per cent a year. A finding by the jury that the note in suit is payable with interest at the rate of six per cent per annum is warranted under evidence that it contains the words “interest at six per.”

4. APPEALS AND ERRORS—when appellant cannot complain that court ordered his plea of general issue to stand to amended declaration. An appellant cannot complain that the court erred in ordering his plea of the general issue to stand as a plea to the amended declaration, when he did not move, after the amendment, for leave to file an additional plea and the record does not disclose that he has any defense inadmissible under the general issue.

*Fitzgerald v. Lorenz*, 79 Ill. App. 651, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN BARTON PAYNE, Judge, presiding.

This is an appeal from a judgment in favor of appellee, rendered in an action of assumpsit by appellee against appellant. The declaration, filed October 31, 1894, contains two special counts and the common counts. The first special count avers “that William Fitzgerald, on the first day of December, 1894, made his promissory note,

bearing date the day and year aforesaid, and then and there delivered the said note to James Lorenz, the plaintiff, in and by which note the said defendant, by the name, style and description of William Fitzgerald, promised to pay to the order of said plaintiff, fourteen months after the day and year last aforesaid, \$1000, payable at Gerald Building," with interest at six per cent per annum. The second count differs from the first only in being on another note for the sum of \$900, due eighteen months after December 1, 1894.

Appellant, May 5, 1897, pleaded the general issue, and November 11, 1897, the case was called for trial, and the note sued on being offered in evidence by appellee, appellant objected, on the ground that the averment in each special count of the declaration with regard to interest was "with interest at six per cent per annum," whereas the notes offered in evidence read merely "interest at six per." Thereupon appellee made a cross-motion for leave to amend his declaration, which the court allowed, and overruled appellant's objection, and appellee filed the following amendment:

"Lorenz                    }  
                  *vs.*        }  
Fitzgerald.                }

"James Lorenz, by Charles McNett, his attorney, amends his declaration as follows: On line 34, after the word 'per,' strike out the words 'cent per annum,' and insert the words 'meaning thereby to pay interest at the rate of six per cent per annum.' On line 17, page 1, after word 'per,' strike out same words as above; strike out and insert same words as above inserted.

CHARLES S. MCNETT, *Pltf's Atty.*"

The amendment was filed after the jury retired to consider of their verdict. The trial proceeded, and the jury returned a verdict for the appellee, and assessed appellee's damages at the sum of \$1734.33. On November 27, 1897, after the verdict was rendered, appellant, by leave of court, filed a demurrer to the amended declaration, which the court overruled, and ordered that the plea of

the general issue theretofore filed to the original declaration should stand as a plea to the amended declaration, overruled appellant's motion for a new trial, and rendered judgment on the verdict.

C. M. HARDY, for appellant.

CHARLES S. MCNETT, for appellee.

Per CURIAM: In deciding this case the Appellate Court delivered the following opinion:

"Appellant's counsel contends that the variance between the original declaration and the notes put in evidence is fatal; that the court erred in permitting an amendment of the declaration; that the amendment was so made that it is impossible to determine in what part of the declaration it belongs; that it is not supported by the proof; that the court erred in ordering the plea of the general issue to stand as a plea to the amended declaration, and in overruling the demurrer to the amended declaration, etc., and that the judgment is excessive.

"The declaration does not purport to set out the notes sued on *in haec verba*, but only in accordance with their legal effect, and the latter is the proper and scientific mode of declaring on a contract. (1 Chitty's Pl.—9th Am. ed.—p. 305; *Crittenden v. French*, 21 Ill. 598).

"The legal implication from the words used in the notes, viz., 'interest at six per,' is that they were to bear interest at the rate of six per cent per annum. In *Gramer v. Joder*, 65 Ill. 314, the note sued on read: 'One year after date I promise to pay to the order of Barbara Joder the sum of \$4000 at ten per cent, value received.' *Held*, the meaning was that the note bore interest at the rate of ten per cent per annum. In *Thompson v. Hoagland*, 65 Ill. 310, the note read: 'One year after date I promise to pay William Thompson, or order, \$374.79, at ten per centum from date.' *Held*, that the note bore interest at the rate of ten per cent per annum. It will be observed that in

neither of the two cases last cited was the word 'interest' contained in the note. See, also, *Williams v. Baker*, 67 Ill. 238, and *Belford v. Beatty*, 46 Ill. App. 539.

"It follows from these authorities that the averment in the original declaration, that the notes were payable 'with interest at six per cent per annum,' was in accordance with the legal effect of the note. This being so, if the amendment was not properly made, as appellant's counsel contends, the irregularity is immaterial.

"But we do not agree with counsel for appellant that it cannot be determined in what part of the declaration the amendment is to appear. It is to appear after the word 'per' and as a substitute for the words 'cent per annum,' which last words are to be stricken out, and there is not the least difficulty in ascertaining the places where the words 'per cent per annum' occur, there being only two such places in the declaration, one in each of the special counts. If, then, the declaration be considered as amended, and the question whether the words 'interest at six per' mean interest at the rate of six per cent per annum, solely a question of fact, the jury were fully warranted in their finding. In *Thompson v. Hoagland, supra*, the court say: 'The word 'interest' is not found in the note, yet we cannot but consider it, and it would be received in the money market, as a note bearing ten per cent interest per annum from its date.. That would be the common judgment of any body of men to whom it should be submitted.' Such was the understanding of the parties themselves. On the \$1000 note is endorsed a receipt of James Lorenz of date February 1, 1896, for \$70, 'being interest in full to above date.' This is exactly the amount due February 1, 1896, for interest from December 1, 1894, at the rate of six per cent per annum. On the note for \$900, and under date July 1, 1896, is a receipt for \$85.50 'interest,' the exact amount of interest due from the date of the note to July 1, 1896, at the rate of six per cent per annum.

"When the court permitted the amendment of the declaration, appellant did not move for leave to file an additional plea. He cannot now, therefore, be heard to complain. (*Knefel v. Flanner*, 166 Ill. 147).

"It does not appear from the record that appellant has any defense inadmissible under the general issue. On the trial he offered no evidence, his sole defense apparently consisting of objections. Appellant's demurrer was to the whole declaration, was general, and was properly overruled.

"Appellant's counsel suggests that the judgment is greater than warranted by the evidence. The amount of the judgment is not in excess of principal and interest due November 11, 1897, the date of the trial, after deducting all payments proved. \* \* \*

"The judgment will be affirmed."

We concur in the views above expressed, and in the conclusion above announced. Accordingly, the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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GEORGE B. CRUICKSHANK *et al.*

*v.*

THE CITY OF CHICAGO.

*Opinion filed October 19, 1899.*

This case is controlled by the decision in *Holden v. City of Chicago*, 172 Ill. 263.

WRIT OF ERROR to the County Court of Cook county; the Hon. COLOSTIN D. MYERS, Judge, presiding.

EDGAR BRONSON TOLMAN, and HARVEY MITCHELL HARPER, for plaintiffs in error.

CHARLES S. THORNTON, Corporation Counsel, and JOHN A. MAY, for defendant in error.

Per CURIAM: This is a writ of error to reverse a judgment of the county court of Cook county confirming a special assessment. The ordinance providing for the improvement fails to state the height of the curb required to be constructed on each side of the street, and on account of this defect it is claimed that the ordinance is invalid. The ordinance involved, so far as the height of the curb is concerned, is substantially like the ordinance which was held to be invalid in *Holden v. City of Chicago*, 172 Ill. 263, and the ruling in that case must control here.

As to the property set out and described in the assignment of errors in the record, the judgment of confirmation is reversed, and the cause is remanded to the county court.

*Reversed and remanded.*

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THE VILLAGE OF HAMMOND

v.

HARRY W. LEAVITT *et al.*

*Opinion filed October 19, 1899.*

1. PUBLIC IMPROVEMENTS—ordinance passed without petition required by act of 1897 is void. The trustees of a village containing less than 25,000 inhabitants are without authority, under the Local Improvement act of 1897, (Laws of 1897, p. 103,) to pass an ordinance for a local improvement, although recommended by the board of local improvements, when a majority of lot owners in any one or more contiguous blocks affected by the improvement did not petition therefor as required by section 4 of such act.

2. JURISDICTION—want of jurisdiction over the subject matter cannot be waived. The absence of a petition for a local improvement in towns of less than 25,000 inhabitants debars the court from acquiring jurisdiction of special assessment proceedings to pay for the improvement, and the right to raise the objection by motion to dismiss is not waived by filing other objections to the confirmation.

3. SAME—objection to jurisdiction may be made by motion to dismiss. An objection to the jurisdiction of the court over the subject matter of a special assessment proceeding may be made at any time, by motion to dismiss as well as by plea.

APPEAL from the County Court of Piatt county; the Hon. F. M. SHOUKWILER, Judge, presiding.

This is a petition, filed in the county court by the appellant, the village of Hammond, on July 19, 1898, for the levying of a special assessment to pay for the construction of a drain in the village, which had been provided for by an ordinance, adopted by the president and board of trustees for the village on July 12, 1898. Annexed to the petition, and forming a part of it, were a certified copy of the said ordinance, attested by the village clerk under the corporate seal; a copy of the recommendation of the improvement by the board of local improvements of the village; and a copy of the estimate of the cost of the improvement, as made by the president of the board of local improvements.

The assessment was made by an officer appointed for that purpose, and on August 30, 1898, the assessment roll was filed in court, and an order was entered directing publication of notice thereof. On September 21, 1898, the appellant presented proof of mailing, posting, and publishing the notice; and the court entered an order, approving the same, and directing that the time of filing exceptions to the assessment should be extended to September 22, 1898. On September 21, 1898, the appellees appeared and filed objections to the confirmation of the assessment. On September 22, 1898, default was entered against all property owners who had not filed objections; and the cause was set for hearing on October 4, 1898, as to the objections filed, and was continued to the latter date.

On October 4, 1898, the appellees, who are the objectors below, appeared, and presented a motion to dismiss the petition of appellant. The court heard the evidence and arguments of counsel upon said motion, and took the matter under advisement. On October 14, 1898, the court entered an order, dismissing the proceedings at the cost of the petitioner, the present appellant, to which objec-

tion was made, and exceptions were preserved. Thereupon, the present appeal was taken by the village from said order of dismissal.

REED & EDIE, for appellant.

LODGE & HICKS, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

Among the objections, filed by the appellees in the court below to the confirmation of the special assessment, were objections to the effect, that no petition, asking for the construction of the proposed improvement, was ever presented to the board of local improvements of the village of Hammond; and that no legal ordinance was passed by the village, authorizing the construction of the proposed improvement. In line with these objections was the third reason, assigned by the appellees in support of their motion to dismiss the petition and the assessment proceedings. The third reason, thus urged in support of the motion to dismiss, was that the village of Hammond had less than 25,000 inhabitants, and that no petition of a majority of lot owners was ever presented to the board of local improvements, asking for the proposed improvement.

The last clause of section 4, of the act of June 14, 1897, "concerning local improvements," provides that, "in cities, towns, or villages having a population of less than 25,000, ascertained as aforesaid, no ordinance for making any local improvement shall be adopted, unless the owners of a majority of the property in any one or more contiguous blocks abutting on any street, alley, park, or public place, shall petition for said local improvement." (Laws of Ill. 1897, p. 103). This requirement of the act is imperative in its character. The city council and board of village trustees in cities, towns, or villages, having a

population of less than 25,000, have no power to pass an ordinance for a local improvement, unless the owners of a majority of the property in any one or more contiguous blocks, abutting on any street, etc., petition therefor. There is no contradiction between section 4 of the act and section 7 thereof, which latter section gives to the improvement board the power "to originate a scheme for any local improvement, to be paid for by special assessment or special tax, either with or without a petition," because the provision, thus contained in section 7, applies to cities having a population of 25,000 or more. (*City of Bloomington v. Reeves*, 177 Ill. 161).

In the present case, the appellant, the petitioner below, produced a copy of the ordinance for the improvement, and a copy of the recommendation thereof by the board of local improvements, and a copy of the estimate of the cost of the improvement; and thereby it made a *prima facie* case. Section 9 of the act provides, that the recommendation of the board shall be *prima facie* evidence that all the preliminary requirements of the law have been complied with. With nothing before it but said *prima facie* evidence, the court would have been justified in presuming that the petition for the improvement, as required by section 4, had been presented. The burden of proof then rested upon appellees, the objectors below, to show, if they could, that said petition had not been presented. Upon the showing that the petition had not been presented, the ordinance for the improvement was absolutely void.

In support of their motion to dismiss, the appellees produced to the court evidence, showing that no petition of property owners had ever been presented to the board of local improvements. The motion to dismiss was addressed to the court, and it was not necessary to wait until the trial before the jury, before introducing proof of a non-presentation of the petition. The only question, which the jury would have had the power to decide,

was, whether the property of the objectors had, or had not, been benefited by the improvement to the amount assessed against it. (*Sweet v. West Chicago Park Comrs.* 177 Ill. 492). We held, in *Merritt v. City of Kewanee*, 175 Ill. 537, that, although the ordinance was *prima facie* valid in view of the recommendation made by the board of improvements, yet, when the proof showed, that the petition had not been signed in accordance with the provisions of section 4, the void character of the ordinance was established. It follows, that the county court was justified in dismissing the proceedings, because, the ordinance being void, it had no jurisdiction to entertain the petition. Appellant claims, that the appellees waived their right to dismiss the proceedings for want of jurisdiction, upon the alleged ground, that, by filing objections to the confirmation of the assessment before the motion to dismiss was made, they thereby submitted themselves to the jurisdiction. The want of jurisdiction over the person may be waived, but jurisdiction over the subject matter cannot be conferred upon the court by consent of parties; and, therefore, the want of it cannot be waived by either party. (*Leigh v. Mason*, 1 Scam. 249; *Beesman v. City of Peoria*, 16 Ill. 484; *Peak v. People*, 71 id. 278). The objection to the jurisdiction may be taken by motion to dismiss the suit, as well as by plea; and a motion to dismiss for want of jurisdiction in the court to take any action at all may be made at any time. (12 Am. & Eng. Ency. of Law, p. 309; *Waterman v. Tuttle*, 18 Ill. 292; *Goodwillie v. City of Lake View*, 137 id. 51).

We are, therefore, of the opinion that the county court committed no error in entering the order of dismissal here complained of. The judgment of the county court is affirmed.

*Judgment affirmed.*

THE PEOPLE *ex rel.* Robert Bethmann  
*v.*181 421  
j202 1181FRANK B. BOWMAN *et al.**Opinion filed October 16, 1899.*

1. **MANDAMUS**—*mandamus should not be resorted to to compel master in chancery to execute deed.* A master in chancery who has issued a certificate of purchase under a mortgage may be compelled, in a summary proceeding before the chancellor, to execute a deed in accordance with the rights of the holder, and resort should not be had to a proceeding by *mandamus*.

2. **MORTGAGES**—*judgment creditor not deprived of statutory right to redeem by being joined in foreclosure against debtor.* A judgment creditor whose lien against mortgaged premises is subsequent to that of the mortgagee, although a necessary party to the bill to foreclose the mortgage, is not, by reason of his being made a party, deprived by the decree of his statutory right to redeem from the sale as a judgment creditor.

3. **SAME**—*judgment creditor may redeem though he obtains a deed from mortgagors after twelve months.* The redemption of lands of a debtor sold on mortgage foreclosure may be made by a judgment creditor within the fifteen months prescribed by statute, although after the expiration of twelve months he obtained a deed from the mortgagors to the lands sold under the decree of foreclosure.

WRIT OF ERROR to the Circuit Court of St. Clair county; the Hon. M. W. SCHAEFER, Judge, presiding.

Joseph and Lizzie Geppert delivered their mortgage deed of trust conveying certain property in St. Clair county, securing an indebtedness of \$2000, which was recorded June 30, 1894. September 28, 1896, B. Goedde obtained a judgment against Geppert and his wife in the circuit court of St. Clair county for the sum of \$400.22, on which execution issued October 12, 1896. A bill was filed to foreclose the above mortgage, making B. Goedde a party defendant, to which he filed answer, and a decree of sale in foreclosure being rendered, sale was had March 27, 1897, at which the property foreclosed was bought by one Henry Mannle, and a certificate of purchase was issued to him by the master, which he afterwards as-

signed to the plaintiff in error. An *alias* execution issued June 22, 1898, on which a levy on the property sold under the mortgage was made June 24, 1898, and the property was accordingly advertised by the sheriff and sold on the 23d day of July, 1898, to B. Goedde for \$3198.80, and certificate of purchase issued to him entitling him to a deed at the end of sixty days, if no redemption. June 24, 1898, no redemption having been made by the mortgagors, the sheriff issued to B. Goedde a certificate of redemption for the sum of \$2707.03, being in full for redemption from the foreclosure sale.

By deed bearing date June 22, 1898, acknowledged June 23, 1898, and filed for record June 24, 1898, Joseph Geppert, and Lizzie, his wife, conveyed by quit-claim deed, for the expressed consideration of \$5000, the premises in question to B. Goedde. The real consideration of this deed was, however, \$300. Afterwards, the fifteen months for redemption having then expired, the plaintiff in error presented his certificate of purchase to the master in chancery, the defendant in error herein, and tendered to him his fees and demanded of him a deed to the property. The master refusing to deliver him a deed, plaintiff in error filed his petition for a writ of *mandamus* to compel the defendant in error, Frank B. Bowman, to execute and deliver to him a deed in proper form conveying the premises to him, and making B. Goedde a party defendant. The defendants answered, and a hearing being had before the court, a jury being waived, and the facts appearing as above stated, the writ was denied and judgment rendered for the defendants and against the petitioner for costs. An appeal to the Appellate Court being prosecuted, the appeal was there dismissed on the ground that the suit involved a freehold, and leave being given to withdraw the record, this writ of error is brought.

M. MILLARD, for plaintiff in error.

SILAS COOK, for defendants in error.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

It appears from the record in this case that a sale was made by the master under a decree of foreclosure and a certificate of purchase was issued. Subsequently, on the 22d day of June, more than fourteen months after such certificate of sale was issued, the mortgagees sold and conveyed their right of redemption to a judgment creditor. The certificate of purchase issued on the mortgage sale was assigned to the relator. The judgment creditor, who acquired the right of redemption from the mortgagees, redeemed from the sale under an *alias* execution issued on a judgment in his favor, recovered before the decree of sale. A levy was made under the execution of that judgment creditor, who redeemed, and a sale under the execution and redemption was made for the amount of the redemption and the debt of the judgment creditor. That sale was made more than fifteen months after the expiration of the time of redemption under the certificate made on the mortgage sale, but the redemption was made within the fifteen months from the time of the sale under the mortgage. The relator, who holds the certificate under the mortgage sale, asked leave to file a petition in *mandamus* against the master in chancery to compel him to execute a deed in accordance with that certificate.

As a matter of practice the application for leave to file a petition for *mandamus* should have been denied. Where a certificate of sale is issued by an officer of a court, such as the master in chancery, that officer, on notice, is before the court at all times, and may by the chancellor be compelled to discharge his duty in a summary proceeding to be heard before the chancellor, and such summary proceeding is a proper remedy to be resorted to to compel the execution of a deed under a certificate of sale, where one is entitled to such deed, and not a resort to a proceeding by *mandamus*. If the latter

method is to be invoked, confusion in the determination of business by the chancellor and complication of the records would necessarily result, which could be avoided by a proper resort to a summary proceeding before the chancellor to compel his officer to comply with his duties. It might well be held that in a case of this character resort cannot be had to a proceeding by *mandamus*, and the petition for *mandamus* would have been obnoxious to a general demurrer for these reasons.

As a matter of practice we have deemed it proper to consider these two questions that arise from an examination of this record but are not raised by assignment of error on the part of the plaintiff in error or by assignment of cross-errors.

The theory of the relator is that, the bill having been filed by mortgagee against the mortgagor and B. Goedde, a judgment creditor of the mortgagor, the judgment creditor was not entitled to redeem after the expiration of one year, as the decree found. It was held in *Boynton v. Pierce*, 151 Ill. 197: "Where a party files a bill to foreclose a mortgage, and there are judgment creditors who have liens against the mortgaged premises subsequent to the mortgage, the judgment creditors are necessary parties to the bill to foreclose, but it has never been understood because they may be made parties defendant to a bill to foreclose the mortgage they lose their right to redeem as judgment creditors." In this case it appears that B. Goedde had recovered a judgment against the mortgagors before the foreclosure of the mortgage, hence he, as a judgment creditor, was a proper and necessary party to that proceeding. But the decree rendered in this case did not deprive him of any right conferred by the statute upon a judgment creditor to redeem from the sale. The right conferred by statute on him as a judgment creditor was not cut off or abridged by reason of his having been made a party to the bill to foreclose, nor by virtue of anything found in the decree. *Wood v. Whelen*, 93 Ill. 153.

It is contended, however, by the plaintiff in error, that because of the fact that after the expiration of twelve months and before the expiration of fifteen months said Goedde obtained a deed from the mortgagors to the lands sold under the decree of foreclosure, he could not, as a judgment creditor, redeem his own lands. This position is not sound. The mortgagors themselves could not redeem after the expiration of twelve months, and the creditor who took title from the mortgagors to whatever interest they had under their deed, obtained no greater right than they had, and that deed conferred no right of redemption. The judgment creditor, as such, had a right of redemption before the execution of the deed, and the deed effected no merger of his judgment in the title so as to prevent such redemption. As held in *Boynton v. Pierce, supra*: "Where a debtor becomes involved and is unable to pay his debts, and the creditors resort to a sale of lands on judgment, it is always desirable that the lands should bring as large a price as possible, in order that all creditors may be paid; hence the law favors redemptions by judgment creditors." Under the redemption made by the judgment creditor, and sale thereunder, he bid the full amount necessary to redeem, as well as the amount of his judgment, and the holder of the certificate under the mortgage sale obtained the full amount to which he was entitled, and has no equitable right to a deed. Neither has he any legal right to a deed under the facts appearing in this record.

It was not error in the circuit court of St. Clair county to deny the writ and enter judgment for costs against the relator.

The judgment is affirmed.

*Judgment affirmed.*

THE BELLEFONTAINE IMPROVEMENT COMPANY *et al.*

v.

F. G. NIEDRINGHAUS *et al.**Opinion filed October 16, 1899.*

181	426
d91a	51
181	426
97a	811

1. ADVERSE POSSESSION—*title to accretions may be acquired by possession of adjoining land.* Accretions to land held under the twenty years' limitation law, or by claim and color of title and payment of taxes, go with the land to which they are attached.

2. SAME—*possession of part of tract includes all land described in color of title.* Possession of part of a tract of land under color of title to the whole tract is possession of the whole tract described in the deed under which title is claimed.

3. ACCRECTIONS—*bar connecting with island is an accretion to latter.* A bar which so forms in a river as to connect with an island is an accretion to it, although the land connecting them is sometimes submerged.

4. RIPARIAN RIGHTS—*title of riparian owner extends to the middle of main channel.* The title of a proprietor on a river extends to the thread of the main channel, and his boundary changes with the variation of the center of the river's main channel.

5. BOUNDARIES—*boundary between States bordering on river is at the center of permanent channel.* The boundary between States separated by a river is the center thread of the permanent stream, and not of that part which flows during high water and is dry at other times.

6. SAME—*riparian boundaries follow gradual changes in main channel of a stream.* Boundaries formed between proprietors or States by the center thread of a river conform to gradual and insensible changes in the channel of the stream, but where a considerable tract, which can still be identified, is by the violence of the stream joined to another tract, the property of the soil continues vested in its former owner.

7. SAME—*local boundary between Illinois and Missouri is west of Willow Bar Island.* The local boundary line between the States of Illinois and Missouri, as well as the boundaries of Illinois proprietors, is the present center thread of the stream between Willow Bar Island and the Missouri bank.

8. EVIDENCE—*declarations of grantor disclaiming accretion are inadmissible against grantee.* Declarations made by former owners of land disclaiming ownership of an accretion to it are not admissible to prejudice the title of their grantee.

APPEAL from the Circuit Court of Madison county; the Hon. WILLIAM HARTZELL, Judge, presiding.

JULIAN LAUGHLIN, E. C. SPRINGER, and J. G. IRWIN,  
for appellants.

TRAVOUS & WARNOCK, for appellees.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

Appellees filed a bill for partition of and to remove a cloud from certain lands situated in township 3, north, range 10, west of the third principal meridian, in Madison county, Illinois. The land is bounded on the south by the north line of the south half of section 23, and the western continuation thereof to the main channel of the Mississippi river; on the north by land of the Granite City, Madison and Venice Water Company; on the east by a channel of the Mississippi river known as "Gaboret slough," and on the west by the thread of the stream in the main channel of the Mississippi river. The bill alleges that the complainants and the defendant the St. Louis Stamping Company are the owners of the land in equal portions, as tenants in common, by title derived through a regular chain of conveyances from the government, and by open, continuous and adverse possession of the same, by them and their respective grantors, for upwards of twenty years, and by possession under claim and color of title made in good faith, with seven years' payment of taxes, as required by the statute. Appellants and about one hundred and fifty other persons were made defendants. The object and purpose of the bill are for partition of a tract of land known as "Gaboret Island," and what are claimed and known as lands and accretions thereto.

Appellant the Bellefontaine Improvement Company, a corporation of the State of Missouri, answered the bill, claiming ownership of a part of the lands sought to be partitioned, known as "Willow Bar Island," and which is by it claimed to be situated in township 46, north, range 7, east of the fifth principal meridian of Missouri;

that it is bounded on the east by the old main channel of the Mississippi river and on the west by a new channel, known as "Sawyer's Bend;" that it also owns the bar lying immediately south of and until recently a part of the first mentioned tract; that the improvement company claims the island and bar are in the State of Missouri and constitute a part of that State, and claims its title is a Missouri title, derived by regular chain of conveyances from the Spanish government. Appellant Turner also answered the bill, claiming title to fractional section 3, sections 10 and 11, and all of fractional sections 14 and 15 lying north of a line running east and west, parallel to and 5.28 chains south of the south line of said sections 10 and 11, in the State of Illinois.

There were numerous disclaimers filed and numerous defaults entered. A decree was entered in accordance with the prayer of the bill, and the defendants, the Bellefontaine Improvement Company and J. B. Turner, prosecute an appeal to this court.

The determination of the controversy between the Bellefontaine Improvement Company and appellees depends on whether the island and bar are in the State of Illinois or in the State of Missouri,—or, in other words, where the thread of the stream of the main channel is with reference to the lands in controversy. As a part of the controversy it is necessary to determine whether Willow bar became and was a part of lands attached to the Missouri shore and constituted a part of the Missouri lands at any time, and whether it was separated therefrom by avulsion. The question in dispute between Turner and appellees is based on the claim of the former to title by reason of certain conveyances and an alleged judgment in ejectment on January 30, 1874, and is a controversy depending on the title of the respective parties.

It was admitted by both appellants in open court, on the hearing, that on the 28th day of January, 1896, immediately preceding the commencement of this suit, the

complainants and the defendant the St. Louis Stamping Company had title to all the real estate involved in this suit by the deeds introduced in evidence as color of title, with seven years' continuous possession under claim of title and payment of taxes successively for said period, and by continuous adverse possession for a period of twenty years immediately preceding said January 28, 1896, except fractional section 3 of lot 3 of the Woolridge subdivision, known as the "Beckman tract," and accretions thereto, and the island known as "Willow Bar Island," and the lands lying west of the west high bank of Gaboret Island.

The appellant Turner claims that Gaboret Island, with the exception of fractional section 2, was patented to William Rector. Rector conveyed the north half, to-wit, fractional sections 3, 10 and 11 and the north parts of 14 and 15, to William O'Hara in 1820. Helen O'Hara Harrel, as sole heir-at-law of William O'Hara, conveyed the same, along with other property, to one Kibbe in 1868. Kibbe recovered a judgment in 1874 against Beckman for possession of fractional sections 3, 10 and 11 and the north part of 14 and 15. Kibbe conveyed the same property, in 1877, to the appellant Turner. Appellees' title to section 3 (which is claimed by Turner) is based upon a tax deed made in 1848, while their title to section 2 originates from the government. The two sections were united in October, 1857, in the conveyance from Hawkins *et al.* to Hopkins, and passed by *mesne* conveyances to complainants below and the St. Louis Stamping Company, each deed describing both tracts. The two fractional sections adjoin, and were used and occupied by appellees and their grantors as one farm. They were so enclosed and used by the Fishers under proper deed and claim of ownership continuously for nearly thirty years.

It is shown that fractional section 2 was conveyed to appellees by *mesne* conveyances from John Stein, who was the patentee thereof. Fractional section 3 was con-

veyed to appellees by *mesne* conveyances from Thomas F. Purcell, who acquired the same by a tax deed from the Auditor of State, of date August 12, 1846. Subsequently the appellees, seeking to further protect their title, offered in evidence a deed of date September 17, 1880, from Frederick Beckman and wife to John Schenk, conveying lot 3. Schenk conveyed to his wife, by will, all his real estate, and June 4, 1887, she conveyed to Peter Schenk, and Peter Schenk and wife conveyed to the St. Louis Stamping Company on May 22, 1891. These latter mentioned conveyances show color of title in the St. Louis Stamping Company, who, with appellees, claim to own the land in controversy a partition of which is sought.

With these conveyances the evidence shows that appellees and the St. Louis Stamping Company paid taxes on fractional sections 2 and 3 from 1885 to 1891, inclusive. This is, as to these lots, color and claim of title and payment of taxes for seven successive years. Fractional sections 2 and 3 having been used continuously under proper deeds and claim of ownership for nearly thirty years as one farm by parties in privity with the title of appellees, appellees, with their grantors, were in adverse possession of fractional sections 2 and 3 for more than twenty years. This possession was with claim of ownership.

Appellants contend that a claim of title by accretion cannot be sustained where the accretion is to land held by claim and color of title and payment of taxes, or to lands held under twenty years' limitation. When adverse possession has ripened into a title, that title relates back to the inception of the possession. It is not necessary that a party should have lands enclosed before he can be said to be in actual possession. It was said in *Fisher v. Bennehoff*, 121 Ill. 426 (on p. 439): "When he has color of title, possession may be shown by the constant and uninterrupted use through a series of years; and of timber land, by taking therefrom wood for fuel, fences and other purposes; or it may be shown by an actual occupancy of

a portion of a tract for which he may have a deed, under which possession is held. In such cases the deed may be regarded as enlarging the possession to all the land it includes." It was held in *Dills v. Hubbard*, 21 Ill. 328: "If he makes entry under a conveyance of several adjoining tracts, his actual occupancy of a part, with a claim of title to the whole, will inure as an adverse possession of the entire tract. Possession is to be regarded as co-extensive with the description in the deeds under which he enters, and the original entry as a disseizin of the owner to the same extent." It was held in *Saulet v. Shephard*, 71 U. S. 502: "Where one has been in the uninterrupted and peaceable possession, for more than twenty years, of the property or real estate to which the accretions sued for are attached, as long as they existed he owns such accretions."

In *Benne v. Miller*, 50 S. W. Rep. 824, decided by the Supreme Court of Missouri March 31, 1899, in speaking of the character of possession necessary to constitute adverse possession, the court say, quoting from *Ewing v. Burnett*, 11 Pet. 53: "To constitute adverse possession there need not be a fence, building or other improvement, and it suffices for that purpose that visible and notorious acts of ownership are exercised over the premises in controversy for the time limited by the statute; that much depends upon the nature and situation of the property, the uses to which it is applied and to which the owner or claimant may choose to apply it; that it is difficult to lay down any precise rule in all cases, but that it may be safely said that where acts of ownership have been done upon land, which, from their nature, indicate a notorious claim of property in it, and are continued sufficiently long with the knowledge of the adverse claimant, without interruption or an adverse entry by him, such acts are evidence of the ouster of the former owner and an actual adverse possession, provided the jury shall think that the property was not susceptible of a more

strict or definite possession than had been so taken and held; that neither actual occupancy, cultivation or residence are necessary where the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership such as he would exercise over property which he claimed in his own right and would not exercise over property which he did not claim."

In speaking of possession as applied to accretions the court said: "An accretion becomes a part of the land to which it is built, and follows whatever title covers the main land, whether it be title by deed or title by possession. In its nature it is not susceptible, during its forming, of that kind of possession which distinguishes the occupation of dry land. But it attached to the dry land even while it is under water, and belongs to the owner of the land, and is in the actual possession of him who holds the actual possession of the main land. If the main land is in fact unoccupied, it is in the constructive possession of the owner of the true title, and that gives constructive possession of the forming accretion. But if the main land is held in adverse possession to the true owner, he is not in constructive possession of the accretion; and since the accretion, in its formative state, is not susceptible of actual occupancy in the sense of a *pedis possessio*, the indicia of the actual possession of him who held on the main land are extended over the forming accretion and bring it within his actual possession. And it is not necessary that such possession of the accretion should be held for ten years to give a possessory title, because title to it follows title to the main land; and when the latter is held under the conditions and for the length of time required by law to vest the title in the possessor, the title to the accretion follows, even though the deposit had been made but a year or a day. One who acquires title to the main land by ten years' adverse possession acquires title to cover deposits made and making

on his front and during the period in which his possessory title was forming. The accretion grows into the land, and grows into the title of him who holds the land as the title itself grows, and when the title to the main land has become perfect it extends over the accretion, however recent its formation."

Under these authorities it is clear that a title by possession, merely, is sufficient to maintain title to accretions to land the title of which is so held by possession. Where one acquires title by reason of color of title and payment of taxes, accretions to land to which the title is thus held go with the land to which it is such an accretion, to the same extent as to a title obtained directly from one holding the patent title.

The evidence showing that as to fractional sections 2 and 3 there was color of title and payment of taxes, with open, notorious, exclusive, hostile and adverse possession on the part of appellees, their title was sufficient to authorize the decree as to these tracts. Further than that, the title to fractional section 2 is shown to be in appellees by transfers from the patentee of the same, and that it, with fractional section 3, was for a period of about thirty years a part of one farm, and together were conveyed by deed by various grantors who were in privity with the title of appellees, and there being such actual, open, notorious and adverse possession for the period of more than twenty years, with claim of title, that possession and claim of title were sufficient, and would draw to the possession all the lands described in the deed, and this would authorize the decree as entered as to these two tracts. It was held in *Zirngibl v. Calumet Dock Co.* 157 Ill. 430: "It is, of course, settled law that possession of part of a tract of land under color of title to the whole tract is possession of the whole tract described in the deed."

Gaboret Island, lying in the Mississippi river on the Illinois side thereof, has been in existence as an island

since the river was known, so far as the evidence in this record shows, and was surveyed and platted by the United States government as a part of Illinois. Opposite Gaboret Island, in the State of Missouri, a tract of land was granted to Hyacinth St. Cyr before the purchase of the Louisiana territory by the United States government, and the tract so granted to St. Cyr was confirmed as United States survey No. 3, and through *mesne* conveyances the Bellefontaine Improvement Company claims title to that tract. Gaboret Island was patented to William Rector by the United States, and through *mesne* conveyances from him, and through color of title, payment of taxes and by possession and limitation, the greater portion thereof became the property of appellees and the St. Louis Stamping Company. By the enabling act of April, 1818, under which Illinois was organized as a State and admitted to the Union, the middle of the Mississippi river was made its western boundary. By the enabling act of March 16, 1820, under which Missouri was organized as a State and admitted to the Union, the middle of the main channel of the Mississippi river was made its eastern boundary. An island was formed in the Mississippi river between Gaboret Island and the western bank of the Mississippi river, which appellees claim is in the State of Illinois and appellants insist is in the State of Missouri. This island is known as "Willow Bar Island." Taking into consideration the manner of its formation and its extent, it is clear that it is an island in the Mississippi river, and its ownership is to be determined by the determination of the question whether it is an accretion to lands on the Missouri side or to Gaboret Island.

As to the formation of the island, it is shown that between Gaboret Island and the Missouri shore there were fluctuations in the channel which rendered the navigation of the river difficult. The weight of evidence, however, shows that the navigable channel was on the western side of the river prior to the formation of this

island, as it has been a greater part of the time since. The evidence with reference to the time when it first was formed is conflicting. The appellants claim that the island was formed by reason of the sinking of certain boats, the first of which sank about 1853. The evidence is, in substance, as follows: William Marcum, who moved with his parents upon Gaboret Island in 1844, testified that he saw Willow Bar Island there as early as 1847, and that he saw the boat "Altona" sink on the west side of the bar in 1856, in what was then the main channel. Captain Seeborn Miller, an old pilot who knew the river intimately in 1847, swears that Willow bar was there at that time and that the main channel was always west of it. Captain Parker, an old pilot whose recollection of the river extended back to 1850, swore that Willow bar was there then, having trees upon it. His brother, Captain Thomas Parker, who knew the river since the early forties, testified that Willow bar formed before the sinking of the boats, and that the main channel was always west of it. Henry Cremer, a resident and former land owner on Gaboret Island, knew Willow bar since 1854, and had on different occasions seen the water in Pocket chute so low that Gaboret Island proper and the bar were practically connected, and states that the channel was always on the west side. Henry Kueter, another old pilot whose knowledge of the river dates from 1854, says the channel was always west of Willow bar. Butt-ron, who testified for the appellants, swore the island formed in the middle of the river, leaving a channel on both sides. Marsh, a witness for appellants, said he did not know what caused the bar, but that to his knowledge the channel had been west of it for upwards of twenty years. Appellants' witness Montgomery, who knew the river intimately from 1852, swore that they always ran west of the bar, and that it formed east of the main channel in which the boats sank. Monroe, a witness for appellants, and who was upon Willow Bar Island as early

as 1858, a year before one of the boats (the "Baltimore") sank, says there were then trees from four to six inches in diameter upon it. The testimony of Pepper, Leverett, Schenk, Pitzman, Roberts, Hirt and other witnesses shows that the channel was always to the west of the island as far back as any of them could remember. There is testimony in the record showing that between 1878 and 1883, (the time not being fixed with certainty,) for a period of about two years consecutively, the channel was on the east side of Willow bar.

The evidence with reference to the wrecks of the boats is, that the "Cornelia" sank in 1853, near the Missouri shore, and the "Altona" two or three years after, five or six hundred yards east of the Missouri shore; that the "Baltimore," the largest boat, sank in 1859, about two hundred feet west of the "Altona;" that the "Badger State" sank on top of the "Altona;" that the "M. M. Runyan" struck on the "Baltimore" and sank below her; that the "Keithsburg" sank in the same neighborhood. All of these boats sank in the winter, when the water is generally lowest and when the boats must follow the main channel most closely. Not only did these boats all sink as stated, but some of the wrecks are still west of the Willow Bar Island, the largest (the "Baltimore") being at the extreme western side, and visible only when the water is so low as to be only two or three feet above zero on the St. Louis gauge.

Willow Bar Island at present is separated by the main deep-water channel from the Missouri shore, while only a shallow stretch of water separates it from the Illinois shore. A number of witnesses have testified to occasions when it was so connected with Gaboret Island proper that persons could walk from one side to the other. Being so connected that there was land, sometimes free of water and sometimes submerged, actually connecting it with Gaboret Island, constituted it an accretion to the latter.

It has been the uniform rule of this court that the title of Illinois proprietors to land on a river extends to the thread of the current or main channel. (*Middleton v. Pritchard*, 3 Scam. 510; *Trustees of Commons v. McClure*, 167 Ill. 23; *Buttenuth v. St. Louis Bridge Co.* 123 id. 535; *Fuller v. Shedd*, 161 id. 462; *Griffin v. Kirk*, 47 Ill. App. 258; *Griffin v. Johnson*, 161 Ill. 377.) And his boundary changes with the changes of the center of the river's main channel. (*Houck v. Yates*, 82 Ill. 179; *Nebraska v. Iowa*, 143 U. S. 359.) In *Nebraska v. Iowa, supra*, it was held: "Frequently where, above the loose sub-stratum of sand, there is a deposit of comparatively solid soil, the washing out of the underlying sand causes an instantaneous fall of quite a length and breadth of the sub-stratum of soil into the river, so that it may, in one sense of the term, be said that the diminution of the banks is not gradual and imperceptible, but sudden and visible. Notwithstanding this, two things must always be borne in mind, familiar to all dwellers on the banks of the Missouri river and disclosed by the testimony: that while there may be an instantaneous and obvious dropping into the river of quite a portion of its banks, such portion is not carried down the stream as a solid and compact mass, but disintegrates and separates into particles of earth borne onward by the flowing water.

\* \* \* The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below and upon either shore. There is, no matter how rapid the process of subtraction or addition, no detachment of earth from one side and deposit of the same upon the other. The one thing which distinguishes this river from the other streams in the matter of accretion is in the rapidity of the change caused by the velocity of the current, and this, in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto." The court sums up the controversy in this language: "Our conclusions are, that, notwithstanding the rapidity of the changes in

the course of the channel and the washing from the one side and onto the other, the law of accretion controls on the Missouri river as elsewhere, and that not only in respect to the rights of individual land owners, but also in respect to the boundary lines between the States."

On the same character of question this court held in *Buttenuth v. St. Louis Bridge Co. supra* (p. 552): "Commercial considerations make it imperative, where States or nations are divided by a navigable river, each should hold to the center thread of the main channel or current along which vessels in the carrying trade pass. That is the 'channel of commerce'—not the shallow water of the stream which at some seasons of the year may be impossible of navigation,—upon which each nation or State demands the right to move its products without any interference from the State or nation occupying the opposite shore." The court also said in that case: "Where a river is a boundary between States, as is the Mississippi between Illinois and Missouri, it is the main—the permanent—river which constitutes the boundary, and not that part which flows in seasons of high water and is dry at other times."

Under the rule announced in these cases it is clear that the boundary line between Illinois and Missouri is, and by the weight of evidence has always been, west of Willow Bar Island, as the thread of the stream is west of that island. Willow Bar Islands are about two miles long, and if any other rule were adopted than that here declared, then the boundary between the State of Missouri and the State of Illinois would, for a distance of two or three miles, not be the thread of the stream, as the thread of the stream would be wholly in the State of Missouri. It is true that in the uncommon case of avulsion, where a considerable tract of land is by the violence of the stream and in consequence of its cutting a new channel separated from one tract of land and joined to another, but in such manner that it can still be identified,

the property of the soil so removed or the tract so cut off by the change continues vested in its former owner; but where the change is gradual, so that it cannot be determined what land has been taken off by the violence of the stream or when its taking away took place, in such case a gradual change of the stream causes the center thread of the stream not only to constitute the boundary of the proprietor's land on that stream to the center thread, but constitutes the boundary of the State. It cannot be said that this record contains any satisfactory evidence of any such sudden change of the thread of the stream as would amount to an avulsion. The change, where any change was made, was gradual and insensible. Neither is there any evidence showing that Willow Bar Island itself was, as a tract of land, cut off from the Missouri shore, but the evidence shows the gradual formation of an island in the stream, and the law of accretions is applicable thereto.

We hold, therefore, the boundary line between the States of Illinois and Missouri, as well as the boundaries of Illinois proprietors, is the present center thread of the stream between Willow Bar Island and the Missouri bank.

Neither are the rule announced in the foregoing cases and the principles herein announced in conflict with the adjudications of the Supreme Court of the State of Missouri. It has been held by the Supreme Court of that State, that where the owner of land in Missouri bordering on the Mississippi river loses a portion of the same by its being submerged or washed away, and a tow-head forms in the river between his land and an island opposite thereto, and land gradually accrues to the tow-head and extends towards his land and within the limits of his original survey, it is nevertheless not an accretion to his land and he has no right thereto. (*Cox v. Arnold*, 129 Mo. 337.) To the same effect is *Cooley v. Golden*, 117 Mo. 33.

It is insisted by the appellants that the court erred in excluding evidence offered by them, by which they

sought to prove that certain owners of lands on the west side of Gaboret Island, opposite Willow Bar Island, did not claim that Willow Bar Island was a part of Gaboret Island. There was no error in excluding this testimony. Owners of land or of any interest therein could not, by any declarations made by them, prejudice the title of their grantee. Neither would their declarations be binding on the appellees, who acquired title through them, for the reason that an accretion to the land purchased from them is determinable solely by reference to the fact of accretion to those lands, and not by an assertion of a claim of ownership. It was not error to exclude that evidence.

From a careful examination of the record we find no error in the decree, and it is affirmed.

*Decree affirmed.*

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MAY E. ROACH

*v.*

HENRY L. GLOS.

*Opinion filed October 19, 1899.*

181	440
96a	209
98a	455

181	440
106a	120

181	440
el13a	408

1. PLEADING—*when averments of answer must be taken as true.* The answer is to be taken as true when a case is submitted for hearing upon bill and answer.

2. RECEIVERS—*when a second mortgagee is entitled to continuance of receivership.* A second mortgagee, holding a deficiency decree, is entitled to the continuance of a receivership after sale of the mortgaged premises on foreclosure of the first mortgage, and to receive the rents and profits during the period of redemption, as against the owner of the equity of redemption, who abandoned the property in an unfinished and unsafe condition, where the amount realized on the sale was only sufficient to satisfy the first encumbrance, the security is insufficient and the mortgagor insolvent.

3. APPEALS AND ERRORS—*when objection that record is not complete is without force.* An objection that the record is not complete is without force when there is nothing upon its face to indicate that a reference to any missing portion is necessary to obviate or cure any apparent errors.

*Glos v. Roach, 80 Ill. App. 283, affirmed.*

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

This is an appeal from a judgment of the Appellate Court, reversing an order or decree of the circuit court, discharging a receiver appointed in a foreclosure proceeding, and directing such receiver to turn over the rents and profits in his hands to the owner of the equity of redemption. The judgment of the Appellate Court, reversing the judgment of the circuit court, remanded the cause with directions to enter a decree ordering the receiver to apply the net rents and profits in his hands, covering the period after the sale of the property, to the payment of the amount due appellee, Glos, who was the appellant in the Appellate Court, under the decree of foreclosure, and to retain any surplus for further direction from the circuit court.

The petition was filed, after the sale under the foreclosure decree had been made and the master had reported the same to the court, by the appellant, May E. Roach, for the discharge of the receiver and the turning over of the receipts and profits to her. The appellee, owning the second mortgage upon the property, filed an answer to the petition. To this answer the appellant filed a replication, but subsequently the replication was withdrawn; and the cause was heard by the court upon bill and answer. The result of this hearing was the discharge of the receiver, as above stated.

The facts are substantially as follows: On September 4, 1894, Sophia Wilnau was the owner of lots 81, 82 and 83, etc., as described in the petition, and, on that date, executed a trust deed to secure a note for \$15,000.00, owned by Alfred C. Harrison. On September 28, 1894, Sophia Wilnau and her husband made a second trust deed upon said lots to secure two promissory notes, amount-

ing to \$2250.00, owned by the appellee, Henry L. Glos. On October 20, 1896, Sophia Wilnau and her husband conveyed the lots to the appellant, May E. Roach, subject to the said trust deeds. On January 30, 1897, Harrison filed the original bill herein to foreclose his trust deed, which was the first lien upon the property, making the appellant, Roach, and the trustee under the second trust deed, and the appellee, Henry L. Glos, the owner of the notes secured thereby, parties defendant thereto. Appellee, Glos, answered the bill, but default was taken against the appellant, Roach. On March 29, 1897, a receiver was appointed upon motion of Harrison, the complainant in the original bill. On June 14, 1897, Glos, the holder of the second encumbrance, filed a cross-bill to foreclose the second trust deed, and therein asked for the appointment of a receiver. The appellant did not answer the cross-bill, but default was taken against her. On July 14, 1897, the cause was referred to a master to take proof and report. On October 18, 1897, the master filed his report, and therein stated that a receiver was needed to protect and preserve the property, and recommended that the receiver already appointed should be continued until redemption from the sale should be made.

On October 19, 1897, the court entered a decree, confirming the master's report, and finding that there was due to Harrison \$17,785.91, and that there was due to Glos, the complainant in the cross-bill, the sum of \$2725.13; finding also that the lien of the trust deed of Glos upon the premises was subject to the lien of Harrison, and therein ordering that the premises be sold upon non-payment of the amounts found due. On November 18, 1897, the lots were sold by the master to Harrison, the first mortgagee, for \$18,183.14, being the full amount of principal and interest and costs due to him. On November 23, 1897, the master filed his report of sale, showing that the property had been sold for enough to pay the amount due on the first trust deed, but leaving nothing for the

cross-complainant, Glos, and that there was still due to Glos the sum of \$2788.91.

On November 23, 1897, the court entered an order confirming the master's report of sale, and continuing the receiver already appointed, until redemption should be made, or the period of redemption should expire.

The Appellate Court granted a certificate of importance, when it entered its judgment of reversal.

**BOWLES & BOWLES, for appellant:**

The decree of a trial court will not be reversed or set aside upon a portion, only, of the record. The absent portion will be presumed to support the findings and decree of the trial court. *Adair v. Adair*, 51 Ill. App. 301; *Tolman v. Wheeler*, 57 id. 342; *Gordon v. Gordon*, 25 id. 310; *Alling v. Wenzel*, 46 id. 562; *Culver v. Schroth*, 153 Ill. 442; *Highley v. Deane*, 168 id. 271.

Where the property is bid in, on foreclosure, at the full amount of complainant's claim, costs and interest, the receiver should be discharged and the possession of the property restored to the owner of the equity of redemption. *Davis v. Dale*, 150 Ill. 239.

The mere filing of a bill to foreclose, with a prayer for a decree of foreclosure, in and of itself creates no lien on the rents and profits accrued or to accrue during the pendency of the foreclosure proceedings. *Bank v. Illinois Steel Co.* 174 Ill. 140; *Haas v. Building Society*, 89 id. 498; *Scott v. Ware*, 65 Ala. 174; *Gilman v. Telegraph Co.* 91 U. S. 603; *Bridge Co. v. Hudelbach*, 94 id. 248.

A receiver appointed on the application of a party is for the benefit of the party having him appointed. *Insurance Co. v. Flieschauer*, 17 N. Y. Super. Ct. 117.

**THATCHER & GRIFFEN, for appellee:**

When a receiver is appointed in a suit to foreclose a first mortgage, the second mortgagee being a party, and the first mortgage is satisfied out of the proceeds of the

foreclosure sale, the second mortgagee may resort to the rents collected by the receiver to pay any deficiency due him. In such case, the first mortgagee having procured the receiver and having the right to satisfy his debt either out of the proceeds of sale or rents collected by the receiver, if he elects to take the proceeds of sale the second mortgagee is entitled to be subrogated to the rents. *High on Receivers*, sec. 688; *Keogh v. McManus*, 34 Hun, 521; *Hintz v. Jenks*, 123 U. S. 297.

An order appointing a receiver is made on behalf of all the parties. *Jackson v. Lahee*, 114 Ill. 287; *Rosenbaum v. Kershaw*, 40 Ill. App. 663; *High on Receivers*, sec. 650; 2 *Daniells' Ch. Pr.* 1740.

A mortgagee in possession, either by a receiver or by himself, is entitled to rents. *Bank v. Illinois Steel Co.* 174 Ill. 140; *High on Receivers*, secs. 643, 644; *Fifield v. Gorton*, 15 Ill. App. 460; *Stephen v. Reibling*, 45 id. 40.

By the appointment of a receiver the mortgagee obtains an equitable claim upon the rents to accrue, and his right to them is superior to that of any one else claiming under the mortgagor. *Oakford v. Robinson*, 48 Ill. App. 270; 2 *Jones on Mortgages*, sec. 1536; *Beach on Receivers*, sec. 532.

Where a cause is set down for hearing on bill and answer, the answer is taken as true. *Taylor v. Taylor*, 52 Ill. App. 527; *Grunenberg v. Smith*, 58 id. 281; *Cook County v. Railroad Co.* 119 Ill. 224.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The contention of the appellant is, that the receiver in the foreclosure proceeding was appointed upon the motion of Harrison, the first encumbrancer, before the cross-bill of appellee, Glos, the second encumbrancer, was filed; that the receiver was appointed for Harrison's sole benefit; that, by the foreclosure sale, Harrison, having bid off the property for the whole amount of princi-

pal, interest, and costs due him, was paid in full; that the appellee did not ask for a receiver, and was not entitled to the funds in the hands of the receiver; that such funds belonged to appellant, as the owner of the equity of redemption; that the second lienholder can only have the rents and profits applied towards the discharge of his indebtedness by having the receivership extended to his mortgage; and that, as appellee failed to do this, they belonged to appellant; and that, therefore, the circuit court properly entered an order discharging the receiver, and directing the rents and profits to be turned over to appellant. This contention cannot be sustained under the facts of this case.

The cause was heard in the court below upon the petition, or bill, and answer. It appears from the recitals in the decree of the circuit court, that the appellant, the petitioner below, withdrew her replication, and submitted the cause for hearing upon bill and answer. When a case is submitted for hearing upon bill and answer, the answer is to be taken as true. (*Derby v. Gage*, 38 Ill. 27; *Fordyce v. Shriver*, 115 id. 530; 1 Ency. of Pl. & Pr. p. 924). Therefore, the statements in the answer, filed by appellee to appellant's petition, are to be regarded as true. The facts, herein referred to, are stated in the answer.

In his cross-bill, the appellee asked for the appointment of a receiver. When the receiver was appointed on March 29, 1897, the appellee was represented by counsel, who joined in the application for the receiver. The order, appointing the receiver, entered on March 29, 1897, provided that one George F. Koester be appointed receiver with the usual powers of receivers in such cases, and with directions to collect all the rents, profits, and issues from the premises, then due or to become due. This order, appointing the receiver, was general in its terms, and did not specify that the receiver was appointed for the especial benefit of the first encumbrancer. There was upon the premises a building of flats, which

was unfinished at the time the receiver was appointed, and the master, in his first report, recommended that such receiver should be continued, until the time of redemption should expire. The sale only realized enough to pay the first mortgage and interest and costs. It did not realize anything toward the payment of the amount due on the second mortgage, and there was a deficiency decree in favor of appellee, the second mortgagee, as appears from the order entered on November 23, 1897, confirming the master's report of sale. By that order, the court directed that the receiver should be continued until redemption should be made, or until the period therefor should expire; and that such receiver should continue to act, as such, with the usual powers of receivers in equity to collect the rents, issues and profits.

The premises were worth no more than the amount realized at the sale, and were, therefore, an insufficient security for appellee's debt. The mortgagor, Sophia Wilnau, was insolvent.

When property is sold at a foreclosure sale for the full amount of principal, interest, and costs, the necessity for continuing the receiver ceases, and he should be discharged, and the possession should be restored to the owner of the equity of redemption. (*Davis v. Dale*, 150 Ill. 239). If, therefore, the decree in this case had done nothing more than find the amount due to the first encumbrancer and direct a sale to realize such amount, the rents and profits accruing between the time of the sale and the redemption of the property, or the expiration of the period of redemption, would have belonged to appellant, as the owner of the equity of redemption. But the decree went further, and found the sum of \$2725.13 to be due to appellee, the second encumbrancer. Nothing was paid by the sale upon the amount due appellee, and he had a deficiency decree. Under these circumstances, appellee was entitled to have the rents and profits collected for his benefit. The fact, that the sale did not realize

enough to pay the decree of the cross-complainant, shows that the property was an insufficient security, so far as his claim was concerned. The insufficiency of the security and the insolvency of the mortgagor warranted the continuance of the receiver in office, and the circuit court erred in discharging the receiver. It made no difference in principle that the deficiency, which existed, applied to the second mortgage rather than to the first mortgage. Nor does it make any difference whether the second mortgage contained a provision mortgaging the rents and profits, or not. Where the security is insufficient, and the mortgagor is insolvent, and there is a deficiency decree, a court of equity will appoint a receiver of the rents and profits after the foreclosure sale. (*First Nat. Bank v. Illinois Steel Co.* 174 Ill. 140).

Under the orders, which were entered, the receivership was virtually extended to the second mortgage. The orders, continuing the receivership after the sale was made, were for the benefit of the second mortgagee, and amounted to an extension of the receivership to his mortgage. It could make no difference, whether the new receiver was appointed upon the application of the appellee, or whether the old receiver was continued upon the recommendation of the master, in view of the failure of the sale to realize enough to pay anything upon the second mortgage, and in view of the insolvency of the mortgagor. (*Cross v. Will County Nat. Bank*, 177 Ill. 33). When a receiver is appointed in a suit to foreclose a first mortgage, the second mortgagee being a party, and the first mortgage is satisfied out of the proceeds of the foreclosure sale, leaving the second mortgage unpaid, either altogether or in part, resort may be had, for the deficiency upon the second mortgage, to the rents collected by the receiver. In such case, if the first mortgagee, who has procured the receiver and has a right to satisfy his debt either out of the proceeds of the sale or out of the rents collected by the receiver, elects to take the pro-

ceeds of sale, the second mortgagee is entitled to be subrogated to the rents. (High on Receivers,—3d ed.—sec. 688, and cases in notes).

It appears that the appellant, the holder of the equity of redemption, abandoned the premises, leaving them in an unfinished and unsafe condition. This, in addition to the other facts mentioned, justified the continuance of the receiver for the benefit of the second lienholder. (8 Am. & Eng. Ency. of Law, p. 235).

Although the record furnished is not a full record of all the proceedings in the circuit court, yet there is nothing upon the face of the present record, indicating that a reference to any portion of the record not before us is necessary, in order to obviate or cure any apparent errors. (*Culver v. Schroth*, 153 Ill. 437). Therefore, the objection, made by counsel for appellant that the record is not complete, is without force.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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G. W. HOGAN *et al.*

*v.*

WALTER M. AKIN.

*Opinion filed October 19, 1899.*

1. STATUTES—*principle of statutory construction stated.* It depends upon the intention of the legislature whether a thing within the letter is within the statute, and in seeking for such intention not only the language used is to be considered, but also the evil to be remedied and the object to be attained.

2. SAME—in case of doubt courts prefer a construction favoring validity. In determining the legislative intent, in case of doubt or ambiguity an interpretation which holds the statute a valid enactment will be upheld, instead of one which would necessitate holding the provision in question invalid, as not embraced in the title.

3. MORTGAGES—*effect where the note fails to state that it is secured by chattel mortgage.* A chattel mortgage is not void, under section 1 of

181	448
89a	*136
181	448
f92a	1651
181	448
f185	388
181	448
f191	1267
181	448
101a	*224
181	448
102a	8

the Chattel Mortgage act of 1895, (Laws of 1895, p. 260,) for failure of the note to state upon its face that it is secured by a chattel mortgage, unless the note has been assigned.

4. SAME—*right of mortgagee to take possession under insecurity clause is not an arbitrary one.* The discretion vested in a chattel mortgagee under the insecurity clause is not an arbitrary one, but he must exercise his judgment in good faith, and have such grounds for feeling himself unsafe as amount to probable cause.\*

5. EVIDENCE—*what may be shown in defense of taking mortgaged chattels under insecurity clause.* In replevin to recover chattel mortgage property taken under the insecurity clause in the mortgage, the mortgagee may show that probable cause existed for believing his debt unsafe and insecure.

*Thompson v. Akin*, 81 Ill. App. 82, reversed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Franklin county; the Hon. E. D. YOUNGBLOOD, Judge, presiding.

C. H. LAYMAN, and W. S. CANTRELL, for appellants:

Where a chattel mortgage is given on personal property, or where any lien is given on personal property as a security for a debt, and the mortgagee or creditor becomes unsafe or insecure, he may take possession of the chattels mortgaged or pledged in order to secure his debt. *Roy v. Goings*, 96 Ill. 361; *Bailey v. Godfrey*, 54 id. 507; *Grady v. Smith*, 14 Ill. App. 305.

Notwithstanding our Chattel Mortgage act, defining how chattel mortgages must be executed and acknowledged, it has uniformly been held by our courts that a chattel mortgage, as between the mortgagor and mortgagee, is good without acknowledgment or record, which was sustained upon the theory that they were simply contracts. *Griggs v. Sanford*, 24 Ill. 17; *Foster v. Pinkham*, 29 id. 141; *Griffin v. Wertz*, 2 Ill. App. 487; *McDowell v. Stewart*, 83 Ill. 538.

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\*The effect of a "danger," "safety" or "insecurity" clause in a chattel mortgage is discussed in a note to *Robison v. Gray*, (Iowa,) 23 L. R. A. 780.

A chattel mortgage is but a conditional sale, and when the mortgagor fails to perform the conditions, the title to the property mortgaged, so far as it is held by the mortgagor, vests in the mortgagee, and where possession is taken according to the terms of the mortgage the title passes though the debt is not due. *Durfee v. Grinnell*, 69 Ill. 371; *Grady v. Smith*, 14 Ill. App. 305; *Jefferson v. Barkto*, 1 id. 568.

HART & SPILLER, for appellee:

Any chattel mortgage securing notes which do not state upon their face the fact of such security shall be absolutely void. *Hurd's Stat.* 1895, par. 25, p. 1105.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

The circuit court of Franklin county entered judgment on the verdict of a jury in favor of Walter M. Akin, appellee, against Richard Thompson and W. B. Martin, in an action of replevin for the possession of the property, together with \$85 damages for its detention and costs of suit. The defendant Thompson removed the record by appeal to the Appellate Court for the Fourth District, but died while the appeal was pending, and appellants, as administrators of his estate, were substituted for him. The Appellate Court affirmed the judgment of the trial court and granted a certificate of importance, in pursuance of which the case is brought to this court.

On January 30, 1897, Akin executed to Thompson his note for \$110, due in five months, and secured the same by a chattel mortgage on the property in controversy. The mortgage provided that the mortgagor might retain possession of the property until default in payment, but contained the usual insecurity clause, stipulating that if the mortgagee should, at any time before the note became due, feel unsafe or insecure, he should have the right to take possession of the property and advertise

and sell it to pay the debt. In the latter part of April, 1897, Thompson, by virtue of that clause, authorized his co-defendant, Martin, a constable, to take possession of the property as his agent and advertise and sell it, for the purpose of collecting the debt. Martin took the property by virtue of the mortgage and his agency, and this replevin suit followed. The defense made at the trial was that the possession was rightfully taken in pursuance of the provisions of the chattel mortgage, in good faith, for the sole purpose of collecting the debt.

At the time the note was made and delivered it did not recite upon its face that it was secured by chattel mortgage. The note and mortgage were written by a justice of the peace, and the note was afterward sent to him, and he endorsed upon it, "This note is secured by chattel mortgage." The trial court, by sustaining demurrers to pleas, adopted the theory that the mortgage was void between the parties to it, and that the defendants had no rights under it, on account of the failure to make such recital. The court also, by the third instruction, took the same ground, and directed the jury to find for the plaintiff, unless they believe, from the evidence, that the words in question, stating that the note was secured by chattel mortgage, were on the face of the note at the time the mortgage was executed, or that plaintiff consented to and ratified the act of putting said words on said note.

To determine whether the court was right on that question involves the construction of section 1 of an act entitled "An act to regulate the assignment of notes secured by chattel mortgages, and to regulate the sale of property under the power of sale contained in chattel mortgages," in force July 1, 1895. (Laws of 1895, p. 260.) The second section of that act regulates the sale of property under the power of sale contained in chattel mortgages and covering that branch of the title. Section 1 is the only portion of the act which relates in any way to the assignment of notes so secured or which is claimed

to have any bearing on the subject under consideration. That section is as follows:

*"Be it enacted by the People of the State of Illinois, represented in the General Assembly, That all notes secured by chattel mortgages shall state upon their face that they are so secured, and when assigned by the payee therein named, shall be subject to all defenses existing between the payee and the payor of said notes the same as if said notes were held by the payee therein named, and any chattel mortgage securing notes which do not state upon their face the fact of such security shall be absolutely void."*

It is argued in support of the holdings of the trial and Appellate Courts, that here is a plain and unambiguous provision of the statute that a chattel mortgage like this one is absolutely void. It is true, we cannot disregard a provision of that kind appearing to be within the intention of the law-makers, but the purpose of construction is to find and give effect to such intention, and a thing which is within the letter is not within the statute unless within such intention. (*Perry County v. Jefferson County*, 94 Ill. 214.) In seeking for such intention we are to consider not only the language used by the legislature, but also the evil to be remedied and the object to be attained. (*Soby v. People*, 134 Ill. 66; *Bobel v. People*, 173 id. 19.) Considering only the language of the enactment, we do not regard it as clear that the legislative intention was to make chattel mortgages void between the parties for a failure to give notice upon the note that it is secured by mortgage. The provision may as readily be construed to apply only when the condition exists which precedes such provision and such notes have been assigned by the payee therein named. The section requires notice upon the face of the notes, and provides that when assigned they shall be subject to defenses, and if they do not contain the notice the chattel mortgage shall be void.

There are other considerations which forbid any other interpretation. One of these arises out of the title of the act. The title was formerly considered no part of the act, and yet it might be resorted to to enable the court to discover the intent, wherever such intent was doubtful or ambiguous. (*Perry County v. Jefferson County, supra*; *Cohn v. People*, 149 Ill. 486.) Under the constitutional provisions now in force the title has considerable importance. Section 13 of article 4 of the constitution requires that the title shall show the object of the law, and makes such title controlling over the body of the act, by declaring the act to be void as to any subject which is not expressed in the title. An act can only be sustained as to the subject expressed in the title, and all other subjects are to be rejected. (*People v. Nelson*, 133 Ill. 565; *Snell v. City of Chicago*, id. 413.) Now, the title in this case does not relate to chattel mortgages generally, but to particular branches of the law governing such securities, which are, the assignment of notes secured by chattel mortgages and the sale of property under powers of sale. To hold that the legislature intended to regulate chattel mortgages generally, and the rights of parties, where no assignment was in any way involved, would necessitate holding the provision in question invalid, as not embraced in the title, and, of course, the act should be construed as a valid enactment, if that end can be accomplished.

All other considerations tend to the same conclusion. It has never been the policy of the law to abridge the rights of parties to contract with each other in such manner as may suit their convenience, where the contract is not against the public interests or the rights of third persons, and we would not readily ascribe to the legislature an intention to so interfere with the right to contract. Under the law a chattel mortgage has never been assignable so as to vest the legal title in the assignee, and the mortgage is subject to defenses in the hands of such assignee. The note, however, could be transferred before

maturity so as to cut off defense, and the object of the act is to destroy the negotiability of notes of that class, so that, in case of an assignment, the assignee would not have rights that the payee did not have. The words to be put upon the note are not words of contract, and the only object the legislature could have had, and the only purpose they could serve, would be to give notice. The assignment of a note secured by chattel mortgage would formerly carry with it the security, but the legislature, to effect its object, provided that there should be notice on the face of the note of its character, and if transferred it should be subject to the defenses, and if there was a failure to give such notice the assignment of the notes should not carry such security which should be void. As between the parties, the defense could be made before this enactment, and all their rights were fully protected. The parties were already notified, and the legislature could not have intended to provide notice for those who already had it. There is no occasion for any legislation protecting the original parties, but there was reason for protecting parties in case of an assignment.

Considering the language used, the evil to be remedied and the object to be attained, it must be held that a mortgage is void for a failure to make the required statement only when such note has been assigned. It follows, that the rulings of the trial court on that subject were wrong.

The trial court also prevented the defendants from proving that ground existed for taking possession of the property under the insecurity clause. The defendant Martin, who took possession of the property, was asked where he found it; whether Akin had traded it off or became dispossessed of it, and what he knew of Akin having sold or disposed of any of it, and the court sustained objections to all these questions. This was wrong; but having excluded the evidence of the ground upon which Thompson acted in directing the constable to take the property, the court gave this instruction:

"Unless you believe, from a preponderance of the evidence, that the note secured by the mortgage in evidence was due, or that defendant Thompson had good cause to feel himself unsafe or insecure, that then the taking was tortious and void, and you should find for plaintiff, and assess his damages at whatever sum shown by the evidence."

The court gave a further instruction that the jury should find for the plaintiff unless they believed, from the evidence, that a reasonable man would have believed himself unsafe or insecure at the time. The rule on that subject is, that the discretion given to the mortgagee is not an arbitrary one, but he must exercise his judgment in good faith, and must have such grounds for feeling himself insecure as amount to probable cause. The reasonable ground required does not consist in actual danger. In *Roy v. Goings*, 96 Ill. 361, it was said (p. 366): "This does not require that there should be actual danger, or that the proofs should furnish the court, at the time of the trial, with reasonable grounds to decide that there was actual danger. It was sufficient if, at the trial, it appeared that at the time of the taking there was apparent danger, such that a reasonable man *might* in good faith act upon it." All that defendants were required to show was that the mortgagee exercised his judgment in good faith, and not arbitrarily, and acted upon probable cause for believing his debt unsafe and insecure. The court erred both in excluding evidence to show probable cause and also in giving the instruction that defendants were bound to show good cause.

The judgments of the Appellate Court and the circuit court are reversed and the cause is remanded to the circuit court.

*Reversed and remanded.*

EVERETT A. THORNTON

*v.*

THE COMMONWEALTH LOAN AND BUILDING ASSOCIATION.

*Opinion filed October 19, 1899.*

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90a \* 81  
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181 456  
98a \* 555

1. MORTGAGES—stipulated solicitor's fee may be allowed in absence of evidence of unreasonableness. A solicitor's fee of ten per cent provided for in a bond and mortgage in case of foreclosure is properly allowed where there is no evidence that it is unreasonable.

2. APPEALS AND ERRORS—when exception is too general to raise point of variance. An exception made to the master's report in a foreclosure suit that the evidence is insufficient to justify finding that any sums are due for taxes and insurance, is too general to raise the point that there is a variance between the pleadings and the proof in respect to those items.

*Thornton v. Commonwealth Loan Ass.* 79 Ill. App. 657, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. H. M. SHEPARD, Judge, presiding.

This is a proceeding to foreclose a mortgage, executed by William C. Miller and wife, and James Borroughs and wife, to the appellee to secure a loan of \$2500.00, as evidenced by a bond in the penal sum of \$5000.00 executed by them. Subsequently, Miller and wife and Borroughs and wife conveyed the premises to the appellant, Thornton, subject to the mortgage.

Default was entered against all the defendants, except Thornton, who filed an answer, to which the appellee filed a replication. The cause was referred to a master in chancery to take testimony and report. The master took testimony on behalf of appellee, but none was introduced by appellant. Objections were filed to the master's report, and overruled by him. By stipulation between the parties, the objections, taken by the appellant to the master's report, were allowed to stand as exceptions to the report in the circuit court.

The exceptions to the master's report were overruled by the court, and a decree of foreclosure and sale was entered for the amount, found by the master to be due to the appellee. An appeal was taken from this decree to the Appellate Court, and the decree was there affirmed. The present appeal is prosecuted from the judgment of affirmance, so entered by the Appellate Court.

**CHARLES PICKLER**, for appellant.

**M. L. RAFTREE**, for appellee.

**Mr. JUSTICE MAGRUDER** delivered the opinion of the court:

Counsel for appellant, in his brief in this court, makes two points only in favor of a reversal of the decree entered by the court below.

In the first place, it is urged, as error, that the circuit court allowed a solicitor's fee of ten per cent upon the amount of indebtedness found to be due to the appellee. We are of the opinion that there was no error in allowing the solicitor's fee thus complained of. (*Telford v. Garrels*, 132 Ill. 550; *Clawson v. Munson*, 55 id. 394). The bond, secured by the mortgage, contains the following provision: "In case legal proceedings of any kind are instituted to recover on this bond, or to foreclose the mortgage securing this bond, an attorney's fee of ten per cent shall be added thereto, and shall become due at the time legal proceedings are instituted on said bond and mortgage." The mortgage provides that, in case it is foreclosed, a solicitor's fee may be taxed and recovered, as provided in the bond. There might be circumstances, under which a fee of ten per cent on the amount due in a foreclosure suit would be unreasonable, even though agreed to by the mortgagor in the mortgage, but we discover no evidence of such unreasonableness here. In *McIntire v. Yates*, 104 Ill. 491, the mortgage contained a

provision that, in case of foreclosure, two per cent on the amount found due on the mortgage indebtedness, should be allowed and included in the decree as a solicitor's fee; and, there, the allowance of the two per cent as a solicitor's fee was held to be proper, and to be properly included in the decree of foreclosure.

In the second place, counsel for appellant complains, that the master allowed plaintiff \$95.32 for taxes and insurance, and that this amount was included in the decree. The matter was presented to the circuit court in the form of an exception to the master's report. That exception was as follows: "For that the said master has found that there is now due complainant on account of said loan, \* \* \* insurance paid August 21, 1896, \$7.50; taxes paid August 26, 1896, \$17.54; insurance paid May 25, 1897, \$15.00; taxes paid May 25, 1897, \$55.28; \* \* \* whereas he should and ought to have found that the evidence was insufficient to justify a finding that any such sums of money were or are due to complainant, and should have disallowed the same." The objection now made is, that the bill contained no allegation as to any amount being due for insurance and taxes; and that, therefore, the *allegata* and *probata* did not correspond. It is undoubtedly a well settled rule of equity pleading, that the allegations of the bill, the proof, and the decree must correspond. A decree should not grant relief, warranted by the facts which the evidence discloses, where there are no averments, to which the evidence can apply. (*Dorn v. Geuder*, 171 Ill. 362). But it is also a well settled rule, that the exceptions to a master's report should point out the grounds of objection thereto with reasonable certainty, and that such exceptions should not be so general in their character, as to give no indication of the particular points sought to be included in them, but should be specific and in the nature of special demurrers. (*Springer v. Kroeschell*, 161 Ill. 358). The rule, that the exceptions to a master's report must be specific and not

general, does not conflict with the other rule, that, in chancery, it is not necessary to take exceptions to the various decisions of the court made in the progress of the cause. (*Chicago Artesian Well Co. v. Connecticut Mutual Life Ins. Co.* 57 Ill. 424). The objection here made is substantially, that there is a variance between the allegations of the bill and the proof. Where a variance is complained of, and an objection is based upon that ground, defendant should point out specifically in what the alleged variance consists. (*Lake Shore and Michigan Southern Railway Co. v. Ward*, 135 Ill. 511; *Probst Construction Co. v. Foley*, 166 id. 31; *Mayer v. Brensinger*, 180 id. 110).

Applying the rule, thus referred to, to the exception made by the appellant to the master's report, it will at once be perceived that such exception is too general to embrace the point now made. By the exception appellant complained, that the evidence was insufficient to justify the finding by the master, that any sums of money were due to the appellee for taxes and insurance. We have examined the evidence taken by the master, and it shows that the amounts allowed for taxes and insurance were actually paid by the appellee and were due to it. Appellant did not state in his exception, that the amounts in question should not have been allowed, because they were not alleged in the bill to be due. In other words, the exception did not proceed upon the ground that the evidence, sustaining the allowance for taxes and insurance, was not applicable to the averments made by the bill. This was a specific ground of objection, which should have been made by the appellant as an exception to the master's report. It is too late to make it now. If it had been made at the proper time, the bill may have been amended, if amendment was necessary. We are, therefore, of the opinion, that the court below committed no error in overruling the exception to the report.

The decree of the circuit court is affirmed.

*Decree affirmed.*

H. H. BLAIR

v.

THE PEOPLE *ex rel.* Lester Barber.

*Opinion filed October 19, 1899.*

1. MUNICIPAL CORPORATIONS—when *mayor pro tem* cannot appoint *city marshal*. A city council having power to elect one of its number *mayor pro tem* during a temporary absence or disability of the mayor, is not authorized to do so, and thus confer upon him the mayor's power to appoint a *city marshal*, merely because of the mayor's inability to attend a meeting of the city council on account of illness, although in the city and not disabled from acting as mayor generally.

2. QUO WARRANTO—what not material in *quo warranto*. In *quo warranto* to determine the title of the respondent to a municipal office it is immaterial whether any other person has title to the office or not.

*People ex rel. v. Blair*, 82 Ill. App. 570, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of McHenry county; the Hon. CHARLES H. DONNELLY, Judge, presiding.

A. B. COON, E. D. SHURTLEFF, and BOTSFORD, WAYNE & BOTSFORD, for appellant.

V. S. LUMLEY, State's Attorney, and R. K. WELSH, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

In pursuance of leave granted, an information in the nature of a *quo warranto* was filed in the circuit court of McHenry county, on the relation of Lester Barber, mayor of the city of Marengo, against appellant, H. H. Blair, demanding that said defendant make answer to the People by what warrant he claimed to hold and execute the office of *city marshal* of said city. The defendant ap-

peared and by his plea claimed title to the office by virtue of the proceedings at a meeting of the city council of said city, at which W. S. Eshbaugh, an alderman, was elected mayor *pro tem* and appointed him city marshal, which appointment was confirmed by the city council and under which appointment he qualified. The People demurred to this plea as not setting out a good title to the office, and the court having overruled their demurrer, they stood by it. The court thereupon found the issues for the defendant and entered judgment for costs against the relator. On appeal the Appellate Court reversed said judgment and remanded the cause to the circuit court, with directions to sustain the demurrer to the plea and to enter judgment of ouster against the defendant.

The city of Marengo was organized August 14, 1893, under the general law for the incorporation of cities and villages, and defendant's plea alleges that on May 7, 1895, in pursuance of said law, an ordinance was passed creating the office of city marshal, and providing for appointment by the mayor, with the approval of the city council, and that this ordinance was in force August 2, 1898, when the proceedings were had under which he claimed title to the office. His plea admitted that the mayor was present in the city of Marengo at the time of said proceedings, and the only averment of fact offered as a basis for the action of the city council in electing one of its number mayor *pro tem* is the following: "And this respondent avers that the mayor of said city was temporarily absent from the said meeting during the entire time of the said meeting, and the said mayor was disabled from sickness from attending the said meeting." The question raised by this averment is whether the condition mentioned in the statute, under which a city council has a right to elect a mayor, existed. If the condition did not exist the council had no right to elect Eshbaugh mayor, and he had no more power of appointment than any other alderman or citizen.

Article 2 of the act under which the city of Marengo was organized relates to the office of mayor, and it provides that he shall be the chief executive officer of the city. Sections 2, 3, 4 and 5 provide for filling that office when there is a vacancy, either temporary or permanent. By section 2 a vacancy, when the unexpired term is one year or over, is to be filled by an election, and by section 3, if the vacancy is less than one year, the city council is authorized to elect the mayor. Section 5 provides that if the mayor shall remove from the limits of the city his office shall become vacant, and section 4, under which the defendant claims, is as follows: "During a temporary absence or disability of the mayor the city council shall elect one of its number to act as mayor *pro tem*, who, during such absence or disability, shall possess the powers of mayor." A mayor, as the chief executive officer of the city, has numerous powers and duties beside the duty of presiding at meetings of the city council. He may be temporarily absent from such a meeting or temporarily disabled from attending it, and still be in the city exercising the other functions of his office and under no disability which would prevent him from performing his other duties. If he is present in the city and not disabled generally from acting as mayor, but is unable to attend a meeting of the city council, the statute expressly provides for such a contingency. Article 3 of said act treats of the city council, its membership, government and proceedings. Section 6 of article 2 provides that the mayor shall preside at all meetings of the city council, but section 10 of article 3, for the purpose of providing a chairman in his absence, gives the council permission to elect a temporary chairman if he is not present. In the case of mere absence from a meeting of the city council this provision is designed to govern. Taking these sections together, it seems plain that section 4 has no reference to absence from a meeting of the city council or inability to attend such meeting. The appointment of a city marshal is not

a function of the chairman of the city council, but under the ordinance the power is in the mayor, and he could make an appointment without being present at any meeting of the council. It would certainly be a proper method to send such an appointment, in writing, to the council. The plea admits that the mayor was present in the city, and does not allege that he was not performing, or was disabled from performing, every duty of his office except that of presiding at this particular meeting. He was the mayor, and his office was not vacant, temporarily or otherwise, and the legislature certainly never contemplated that there might be two persons filling that office at the same time and asserting a right to discharge its duties in opposition to each other. The absence referred to in the statute is not mere absence from the council chamber while in some other part of the city and acting as chief executive, but it is absence from the city for such a length of time as would reasonably call for the appointment of a mayor in his place, or disability to act in the capacity of mayor generally. The mayor, and not the council, is given the power to select a city marshal for the city of Marengo. He is chosen by the electors of the entire city and is supposed to have the interests of the people at heart. There is no presumption in favor of the council and against the mayor that he will neglect the affairs and interests of the city and disregard its welfare. The plea does not show the existence of the conditions specified in the statute, which authorized the city council to create a mayor for the city.

The plea also sets out at length an ordinance of the city relating to the city marshal, passed before the re-organization under the general law, and proceedings, from which it appears that Joseph Dunwoody was appointed and confirmed as city marshal May 11, 1897, and claimed the office, and it sets up alleged defects in his title to the office for the purpose of showing that there was a vacancy when defendant was appointed. It is not

necessary to consider any question of that kind. Whether the office was vacant or not, the attempted appointment of defendant was illegal and void and he has no title to the office. As he has none, it is immaterial whether any other person has or not. Under the statute Dunwoody might have been made a party and his right also settled, but that was not done.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

GABRIEL K. WRIGHT *et al.*

v.

MATHIAS L. RAFTREE.

*Opinion filed October 19, 1899.*

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1. SPECIFIC PERFORMANCE—*oral contract must be clearly established where the Statute of Frauds is pleaded.* In a suit for the specific performance of an oral contract to convey land, where the Statute of Frauds is pleaded, the contract to convey should be clear and unmistakable in its terms, and be established by testimony of an undoubted character by the party seeking to enforce it.

2. EVIDENCE—*when declarations by a party in his own favor are incompetent.* Testimony as to declarations in his own favor, made by a party to an action but not in the presence of the adverse party, is not competent evidence for the former.

3. SAME—*secondary evidence of contents of letter is inadmissible in the absence of proper foundation.* Evidence by a party to a suit as to the contents of a letter written by him to the adverse party is inadmissible, when no notice to produce the original was given.

4. STATUTE OF FRAUDS—*contract relating to land cannot rest partly in parol.* To satisfy the requirement of the Statute of Frauds a contract relating to land must be wholly in writing and cannot rest partly in parol.

5. SAME—*when oral contract to convey land is uncertain.* An oral contract to convey land is uncertain in its terms where no time is specified when the sale is to be completed, payment made, the deed delivered, or from what dates stipulated interest is to run.

6. SAME—*part performance must be under the contract relied upon.* There is not such a part performance of an oral contract for the purchase of land as will take the contract out of the Statute of Frauds, where no purchase money was paid and the acts relied upon

as constituting the part performance were not done under the contract and in performance thereof, but under claim of title derived from another source.

7. *SAME—notice of void oral contract to convey land has no legal force.* A land owner who may, under the Statute of Frauds, lawfully refuse to perform an oral contract to convey, may repudiate the contract by conveying the land to a third party, and the latter is not affected by notice of the prior attempted sale.

8. *SAME—when Statute of Frauds is sufficiently pleaded.* The Statute of Frauds is sufficiently pleaded in a suit to enforce an oral contract for the conveyance of land where the answer avers that the contract is not in writing, and states sufficient facts to show the protection of the statute is sought.

APPEAL from the Circuit Court of DuPage county; the Hon. C. W. UPTON, Judge, presiding.

The original bill in this case was filed June 17, 1892, by the appellee against the appellant, Gabriel K. Wright alone. The bill alleges that, on July 15, 1887, the appellee bought from one Page lots 1 to 68 inclusive in the re-subdivision of block 5 in Stough's second addition to Hinsdale in DuPage county for \$3000.00, and received deeds therefor, which were recorded on August 2, 1887; that the deed conveying four of the lots to-wit, lots 47, 48, 49 and 50, was a quit-claim deed, and the deed conveying the balance of the lots was a warranty deed; that the appellee took possession of the premises, and improved the same at an expense of some \$12,000.00 by erecting a house and barn, building sidewalks, laying drains, etc.; that in October, 1891, appellee moved into the house, and has since occupied it as a home; that, at the date of such purchase, Oliver J. Stough claimed an interest in said four lots, to-wit, 47, 48, 49 and 50; that, before said purchase was closed, Stough agreed with appellee to sell and convey all his interest in said four lots for \$400.00 to be paid by appellee whenever it was convenient for him to do so with interest on said sum of \$400.00 at the rate of six per cent per annum. The original bill prays for an injunction, restraining Wright from

entering upon said four lots and interfering with the improvements thereon; and that appellee might be decreed to be the owner thereof; and that Wright might be decreed to convey the same to appellee upon payment of the amount due under the said agreement, etc.

Wright filed an answer to the original bill, denying that appellee bought said four lots from 47 to 50 inclusive, or any of them, from Page, or that appellee ever had any interest in the same, or that appellee ever was in possession thereof, or made any improvements upon said four lots; and, in his answer, Wright sets up, that, on July 15, 1887, Stough was absolute owner in fee of said four lots; that appellee many times tried to purchase said lots of Stough, but failed to do so; and the answer further denies, that Stough ever agreed to sell said four lots to appellee for the sum and upon the terms stated. Wright also sets up in his answer, that he had lately purchased said four lots from said Stough; that said purchase was made for cash; that Wright had the title examined, and found the same good; that no one was then in adverse possession of said lots. By the amendment to his answer Wright pleads the Statute of Frauds, stating that, if there was ever any such agreement between appellee and Stough, it was entirely verbal, and no part of it was in writing, nor was any contract or memorandum thereof in writing ever made; and the answer insists upon the application of the statute.

On October 4, 1897, appellee filed an amended bill, stating therein substantially the same facts as are alleged in the original bill, and stating further, that, in 1891, appellee called on Stough, and told him he was ready to pay the said \$400.00 and interest, and asked for a deed, but that Stough postponed the matter, and failed to accept the money, or make the deed. The amended bill also sets up, that, on June 1, 1892, Stough conveyed said four lots to Wright, and that Wright executed a trust deed to one Ballagh to secure certain notes payable to

the order of Stough, claimed to be purchase money notes; that said deed and trust deed were executed in pursuance of a conspiracy, entered into by appellants Stough and Wright to defraud appellee; that appellee is ready and willing to pay to Stough and Wright all the moneys due under said agreement with Stough. The amended bill prays, that Wright or Stough or both of them may be decreed to convey the said four lots to appellee on payment of the sums found due under said agreement, and that said trust deed may be declared void, and the trustee, Ballagh, be directed to release the same; and that Stough may be made to deliver up and cancel the said notes.

The answer of Stough to the amended bill denies, that the appellee ever purchased the four lots in question of Page, or ever had any interest therein; admits that the appellee is in possession of the other lots, except the four numbered from 47 to 50 inclusive, and has made improvements thereon, but denies that the appellee has ever been in possession of, or made improvements upon, the said four lots; denies that he ever made any such agreement with appellee for the sale of the lots as is set up in the bill, and claims that, on July 15, 1887, he was the absolute owner in fee of said four lots; and that appellee endeavored many times to purchase the same, but failed to do so. Stough, also, alleges in his answer, that he has sold the four lots to Wright, and was in possession of the same when he made the sale; he denies that, in 1891, or at any other time, appellee offered to pay \$400.00 and interest. The answer denies all the material allegations of the bill, and prays that it may be considered as a demurrer to the bill; avers that he, Stough, "never made any contract or memorandum in writing with the said complainant, or his agents, to sell or convey lots from 47 to 50; \* \* \* and that said contract, as set forth in said bill of complaint, is contrary to the statute in such case made and provided."

Wright, Stough, Ballagh, trustee, and Samuel Powell, successor in trust, were made defendants to the amended bill, and all answered the same. Replications were filed to the answers; and the case was referred to a master in chancery to take proofs and report. The master reported in favor of granting the prayer of the bill. Exceptions were filed to the report of the master and overruled. Thereupon, the court entered a decree, granting to the appellee the relief prayed in his bill. The present appeal is prosecuted from the decree so entered.

Of the lots, bought from Page by the appellee, those from 1 to 34 inclusive lie east of Stough street in Hinsdale. Lots from 35 to 68 inclusive lie west of Stough street, and constitute a block which is bounded on the east by Stough street, on the west by Jackson street, on the north by Chestnut street, and on the south by Towne place. The four lots in controversy in this suit lie in the south-east corner of the block, and front on Towne place, and run north to an alley which runs east and west through the block. An alley also runs north and south through the block from Chestnut street down to the alley already referred to as running east and west. The east side of lot 47 is on the west side of Stough street, and lots from 35 to 46 inclusive front upon Stough street. The dwelling house and barn, erected by the appellee, are not upon the four lots in question, but are about one hundred and fifty feet north thereof.

WILLIAM JOHNS, and LAWRENCE P. CONOVER, for appellants.

GEORGE M. STEVENS, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The only lots in controversy in this case are the four lots numbered from 47 to 50 inclusive, which lie in the south-east corner of the block embracing lots from 35 to

68 inclusive. The bill was filed by the appellee for the purpose of enforcing the specific performance of an oral contract to sell and convey said four lots, alleged to have been made by the appellant, Stough, with the appellee, Raftree. Appellee purchased all the lots, except the four lots in question, from Benjamin V. Page, and received from Page a warranty deed therefor. It is conceded, that Page had no record title to the four lots in question, although it would appear that he claimed to have been in possession thereof. The appellee, however, took from Page a quit-claim deed of these four lots. The record does not show what title Stough had to the lots in question. Stough introduced in evidence a warranty deed, executed to him by Paul Haag and wife, dated November 13, 1885, and recorded December 1, 1885, conveying to him the four lots in question. It clearly appears, however, that Stough claimed the title to these four lots, and had an interest therein, which appellee deemed it advisable to purchase. Whether Stough had a good title or not, appellee seeks to compel him to make a deed of such title as he had.

If any contract was made by Stough to sell the lots in question to appellee, it was merely a verbal contract.

It is a well settled rule that, where a bill is filed for the specific performance of an oral contract to sell and convey land, the contract must be certain, clear and unambiguous in its terms and in all its parts. When it is vague and uncertain, or the evidence to establish it is insufficient, equity will not enforce it; the terms of it must be mutually binding upon the parties, and based upon a valuable consideration. In order to take a case out of the operation of the Statute of Frauds—which has been pleaded in this case—a parol contract to convey land should be clear and unmistakable in its terms, and should be established by testimony of an undoubted character. The contract must not only be clear, definite, and unequivocal in its terms, but it must be established by com-

petent proof, and the burden of proof is upon the party seeking to enforce it. (*Pond v. Sheean*, 132 Ill. 312; *Tink v. Walker*, 148 id. 234; *Geer v. Goudy*, 174 id. 514).

It makes no difference what has been done in part performance of an alleged oral contract to sell land, if it is not first shown that such a contract exists. The evidence in the present case does not show clearly, that the oral contract sought to be enforced was ever made.

The appellee swears that, some time in the summer of 1887, between July 15, 1887, and August 2, 1887, the appellant, Stough, agreed to sell him the four lots in question for \$400.00, to be paid whenever appellee should find it convenient to do so, with interest at the rate of six per cent per annum. The appellant, Stough, swears that he never made any agreement with the appellee to sell him his interest in the lots in question. Stough swears that he offered to sell the lots to appellee, but that appellee never accepted his offer, or promised to pay him any money. The only testimony besides that of appellee and Stough is the testimony of H. C. Middaugh and the appellant, James H. Ballagh. Middaugh, who appears to have been an agent or representative of the appellee, swears that appellee told him that Stough had agreed to sell the lots to appellee for \$400.00. The declarations of appellee, thus testified to by Middaugh, were not made in the presence of the appellant, Stough, or of the appellant, Wright, and, therefore, were not competent evidence, and should not have been admitted. (*Geer v. Goudy, supra*). The testimony of Ballagh, who appears to have been an agent of Stough, tends somewhat to confirm Stough's statements. Ballagh swears that, in the fall of 1890, long after the oral contract is alleged to have been made, Raftree told him that he had long before that had some talk with Stough about buying the lots in question, but that such talk had amounted to nothing, and that he wanted to make to Stough another proposition for their purchase. Ballagh further says, that appellee did then make him a

proposition for the purchase of the lots, and that he submitted the same to Stough, but that Stough declined to accept it.

If a valid contract was made for the sale of the lots in July or August, 1887, it is singular that the appellee should have made a proposition for their purchase in 1890. It is manifest, from the statement thus made of the proof as to the making of the contract, that the existence of any such contract is not clearly established. It is supported by the testimony of the appellee alone, because the testimony of Middaugh was, as has already been stated, incompetent, and mere hearsay. The making of the contract is denied by the appellant, Stough, and the testimony of Ballagh confirms that of Stough. We are, therefore, obliged to conclude, that the court below erred in finding that the oral agreement, set up in the original and amended bills, was established by the proof in the case.

Appellee contends, however, not only that the agreement of sale, as set up in his bill, was made, but that it was in writing. This contention is based upon certain letters written by Stough to the appellee, which were introduced in evidence. In the first of these letters, dated September 3, 1887, Stough says to appellee: "I am liable to have to go west any day now. Do you want to say anything more to me about block 5 before I go?" Again, in a letter written by Stough to appellee, dated September 6, 1887, he says: "Yours at hand. My object in writing was that any day I am liable to be off for Cal., to be back next May or June, and it occurred to me that you might want it done before I went. I am satisfied to wait. What is the price of your place? I might find you a buyer among my many callers." On November 7, 1887, Stough says: "Will buy your house, half cash half lots, if you use the cash to build at Stough. Will lend you the money to build at Stough. Will let you sell lots at Stough at big commission." These are the only letters

written by Stough and relied upon as written evidence of the contract. There is nothing in these letters inconsistent with the statement of Stough, that he offered to sell the lots to Raftree, but that Raftree never accepted his offer, or offered to pay him any money. The appellee swears, and the theory of his bill is, that the oral contract was made in July or in August, 1887. The letters introduced certainly show that some negotiation, which had been going on between the parties, was incomplete as late as September, 1887. It is proven that Stough was a large owner of lots in Hinsdale, and was engaged in selling his own lots. It, also, appears, that, in 1889, he left Chicago and Hinsdale, and went to California, being at the time more than seventy years of age. Appellee owned a house upon Lincoln street in Hinsdale, which he desired to sell with a view to building a new house upon the lots purchased from Page. Stough offers in one of the letters to sell this house for appellee, and in another to buy it from him, and offers, also, to lend him money to build his new house. The new house was not built upon the four lots in question, but upon other lots upon the west side of Stough street, which had been purchased from Page. The letters do not establish any such contract as is set up by appellee, but are entirely consistent with the theory of the appellants. Appellee seeks to support his contention as to a written contract by stating the contents of a letter, which he claims to have written to Stough in answer to the latter's letter of September 3, 1887. But this testimony as to the contents of his own letter was incompetent, as no notice was given to the appellants to produce the original of the letter written by the appellee; and, therefore, no proper foundation was laid for proving its contents by parol. It is not claimed, that the whole of the contract, alleged to have been made, was in writing, but the portions thereof, which were claimed to be embodied in writing, were sought to be added to, and made complete, by oral

testimony. It is, however, a well settled rule, that "the entire contract must be in writing to satisfy the statute; it will not be sufficient that the greater part of the contract is in writing; it must all be in writing." (*Cloud v. Greasley*, 125 Ill. 313). "The contract itself cannot be partly in writing and partly in parol." (*Farwell v. Lowther*, 18 Ill. 252; *Lane v. Sharpe*, 3 Scam. 566; *Seymour v. Belding*, 83 Ill. 222).

The oral contract in question is not only not established by sufficient proof, but, if it were proven, it is indefinite and uncertain in its terms, as they are set up in the bill, and sworn to in the testimony of the appellee. According to the terms of the contract, no time was specified when the sale was to be completed, or the deed to the lots was to be delivered. Appellee says, that Stough agreed to allow him to pay the money whenever it should suit his convenience to do so. Appellee says, that he was to pay interest at the rate of six per cent, but it does not appear from what date the running of the interest was to begin, or at what date it was to end. (*Farwell v. Lowther, supra*; Story's Eq. Jur. sec. 764).

Even, however, if there was such an oral contract as the appellee insists upon, the Statute of Frauds is set up in the answers, and, as that statute requires all contracts for the transfer of land to be in writing, the statute is applicable, unless such acts of part performance under the contract are shown as take it out of the statute. We have frequently decided that an oral sale of real estate may be taken out of the Statute of Frauds "by a payment of the purchase money, being let into possession, and the making of lasting and valuable improvements." (*Holmes v. Holmes*, 44 Ill. 168; *Ferbrache v. Ferbrache*, 110 id. 210; *Pond v. Sheean*, 132 id. 312). In *Holmes v. Holmes, supra*, we said: "While the cases may not all go to the length of requiring all of these acts to constitute such a part performance of the contract, as to require a decree for the specific execution of the contract, still we are aware

of no well considered case which has dispensed with the payment of the purchase money. This is regarded as essential to take a case out of the operation of the statute." Where a promise is made by a parent to a child to convey land, the rule requiring payment of the purchase price is sometimes relaxed. (*Bright v. Bright*, 41 Ill. 97). But, in such case, the relationship of the parties constitutes a sufficient consideration. Here, however, no such relationship existed; the contract, according to appellee's contention, was purely and simply an oral contract for the sale of land; and the evidence is clear that no part of the purchase money was paid or tendered.

Next to the payment of the purchase money, the other acts of part performance, which take the contract out of the Statute of Frauds, are the taking of possession, and the making of lasting and valuable improvements. But the rule in regard to the taking of possession is, that possession must be taken under the contract, and in performance of the contract. The improvements also must be made under the contract of purchase, and not otherwise. It is well settled, that the acts relied on to show part performance will not operate to defeat the Statute of Frauds, unless they are done under the contract itself, and for the purpose of performing it. (*Wood v. Thornly*, 58 Ill. 464; *Clark v. Clark*, 122 id. 388; *Pond v. Sheean, supra*; *Cloud v. Greasley, supra*). In the case at bar, there was a fence which enclosed the lots when appellee made his purchase from Page. Page had previously made a lease of all of the thirty-four lots, constituting the block, to one Anderson. Appellee took a quit-claim deed of these four lots from Page, and swears—and the other testimony shows—that he entered into possession under Page and under the quit-claim deed which he received from Page, and not under any oral contract made with Stough, or for the purpose of performing such oral contract.

It appears that the block already referred to consisting of the thirty-four lots from 35 to 68 inclusive, was an

irregular and uneven piece of ground. There was something like a hill, and there were other elevations, at the point north of these four lots, where appellee subsequently built his house and barn and chicken-house. He was obliged to level this hill or these elevations, in order to make the improvements mentioned. There was a ravine or gully, not deeper in any one place than three or four feet, running across a part of these four lots in the south-east corner of the block, and south of the alley. Some of the dirt, obtained from leveling the hill or elevations, was placed in the ravine or gully referred to. This disposition of the dirt, however, was as much for the convenience of the appellee in leveling the ground where his houses were built, as it was an improvement of the four lots in question. Appellee also put in some tiles and drains, which extended from the lots, on which his houses were built, down to the four lots in question; but these drains were more for the convenience and improvement of the lots north of the alley, than of those lots which were south of the alley. It is said, also, that the appellee built a sidewalk in front of these lots, and leveled the street in front thereof, but this was for his own convenience in going from his home to the depot which is situated to the south of these four lots. It, also, appears that the appellee used these lots for pasturing purposes. We do not deem it necessary to decide whether the filling in of this ravine, and the putting in of these drains, and the building of the sidewalk, constituted such valuable and lasting improvements, as the authorities hold to be necessary, in connection with the payment of the purchase money and the taking of possession, to show such acts of performance as will take the contract out of the operation of the Statute of Frauds. We are satisfied, not only that no purchase money was paid, but that no possession was taken and no improvements were made under this contract and in performance of it. Even if, therefore, there was a contract, it is not clear that

there were such acts of part performance as take it out of the statute.

In view of what is said, it makes no difference whether Wright, who purchased the lots from Stough, had notice of the contract or not. The evidence tends to show that he had no such notice. But, if he did have such notice, the law is that notice, actual or constructive, of a contract which is void under the Statute of Frauds, will not prevent the person, having such notice, from becoming a purchaser of the property from the original owner. Where the owner may lawfully refuse to perform a contract, he may lawfully sell and convey to another, and, by so doing, repudiate the contract; and a purchaser from him will not be affected by the prior sale, rendered void by the Statute of Frauds. (*Van Cloostere v. Logan*, 149 Ill. 588).

It is objected by the appellee, that the Statute of Frauds is not properly pleaded in the answers filed by appellants below. This objection is without force. One of the answers expressly refers in terms to the Statute of Frauds as such; and the other pleads it in the language set forth in the statement preceding this opinion. The averments here are regarded as sufficient. "In pleading the Statute of Frauds an express reference to the statute by its title or otherwise is not necessary. \* \* \* But sufficient facts should be stated to show that the defendant seeks the protection of the statute. And the plea or answer setting up the statute should expressly aver that the contract was not in writing, else it will be presumed to be so." (9 Ency. of Pl. & Pr. pp. 713-715). Here, the answers aver, that the contract was not in writing, and state sufficient facts to show that the protection of the statute is sought.

The decree of the circuit court is reversed, and the cause is remanded to that court with instructions to proceed in accordance with the views herein expressed.

*Reversed and remanded.*

JOHN GRAHAM

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

181	477
184	389
87a 129	

*Opinion filed October 19, 1899.*

1. **INDICTMENT**—when *indictment sufficiently charges attempt to obtain money by confidence game*. An indictment under section 98 of the Criminal Code, (Rev. Stat. 1874, p. 366,) which charges that the accused unlawfully and feloniously attempted to obtain from a specified person his money “by means and by use of the confidence game,” sufficiently describes the offense under the express provisions of section 99 and of section 6 of division 11 of such code.

2. **CONSTITUTIONAL LAW**—*section 99 of Criminal Code is not unconstitutional*. The constitutional right of an accused person to demand the nature and cause of the accusation against him is satisfied by a charge in an indictment, framed under section 99 of the Criminal Code, that the accused unlawfully and feloniously attempted to obtain money from a specified person “by means and by use of the confidence game.”

3. **CRIMINAL LAW**—*essentials of an attempt to commit a crime*. An attempt to commit a crime involves, as its essential elements, the intent to commit the crime, the performance of some overt act towards its commission and failure to consummate such crime.

4. **SAME—venue**—*where prosecution for obtaining money by confidence game should be instituted*. A prosecution under section 98 of the Criminal Code, for obtaining money by means of the confidence game, should be instituted in the county where most of the acts preparatory to the crime were committed and where the money was obtained.

5. **CONFIDENCE GAME**—*when attempt to obtain money by confidence game is not proved*. An indictment for an attempt to obtain money by means of the confidence game, of which the failure to consummate the crime is an essential element, is not sustained where it is shown the money was in fact obtained, although in another county than that in which the prosecution was had.

**WRIT OF ERROR** to the Circuit Court of Perry county; the Hon. M. W. SCHAEFER, Judge, presiding.

At the May term, 1898, of the Perry county circuit court the grand jury returned into open court an indictment against plaintiff in error containing two counts.

The first count presents that "John Graham, *alias* Jim Wheeler, late of the county of Perry and State of Illinois, on the seventh day of November, in the year of our Lord 1896, at and in the county aforesaid, unlawfully and feloniously did attempt to obtain from John A. Bowlin his money by means and by use of the confidence game, contrary," etc.

The second count presents that "the said John Graham, *alias* Jim Wheeler, *alias* James Wheeler, *alias* John Snearly, late of the county of Perry and State aforesaid, in the year of our Lord 1896, at and in the county aforesaid, unlawfully and feloniously did attempt to obtain from John A. Bowlin \$1500.00 good and lawful money of the United States, and of the value of \$1500.00, the property of the said John A. Bowlin, by means and by the use of the confidence game, contrary," etc.

A motion was made to quash the indictment for reasons stated in the opinion of the court. This motion was overruled, and exception was taken by plaintiff in error.

Plaintiff in error entered a plea of not guilty, and was tried before a jury, who found him guilty, as charged in the indictment, and found his age to be forty-one years. Motions for new trial and in arrest of judgment were made, and overruled, and exceptions were taken. Judgment was entered upon the verdict, and the plaintiff in error was sentenced to the penitentiary to be there confined until discharged by due process of law.

The material facts developed by the testimony are as follows: On November 5, 1896, a stranger approached John A. Bowlin on the streets of DuQuoin in Perry county, introducing himself to Bowlin as Jim Wheeler, and informing Bowlin that he had come to DuQuoin to see the latter to learn if he was related to Andrew Bowlin. John A. Bowlin stated that he had no relative by that name. Wheeler, or the man calling himself Wheeler, then proceeded to tell John A. Bowlin that he had had a partner by the name of Andrew Bowlin; that said Andrew Bowlin

had recently died at a town in central Illinois; that he was looking for some one who could fill his place; that he, Wheeler, and said Andrew Bowlin, and a certain Indian, who was stated to be then in the woods near Cairo, Illinois, owned a valuable gold mine in Arizona; that they had taken from said mine a large quantity of gold, and started to Washington, D. C., for the purpose of disposing of the gold at the government mint, and securing a patent or title from the government to the land, upon which the mine was located; but, that upon their arrival in Illinois, Andrew Bowlin sickened and died; and that he, Wheeler, and the Indian were both ignorant and uneducated and in need of some one to assist them in their enterprise. Wheeler then produced from his pockets specimens of ore, which, he stated, were gold of great value, and had been taken from his mine in Arizona; and that the Indian near Cairo had in his possession a large bulk of the gold in the form of two gold bricks or bars.

Bowlin then invited Wheeler to take dinner with him at the residence of his daughter, Mrs. Fishback, living in DuQuoin, where they both went. There, in the presence of Mrs. Fishback, Wheeler repeated his story of the gold mine in Arizona, the death of his partner, the presence of the Indian with the gold bars in the woods near Cairo, and again displayed the specimens of gold ore taken from the mine. Wheeler then and there offered to give Bowlin an interest in the mine and gold bricks upon such terms as the Indian would agree to, if Bowlin would go on to Washington with him, and attend to the business of securing the patent, etc. It was then arranged, that Bowlin should go with Wheeler that night, to-wit, the night of November 5, 1896, to Cairo. Accordingly, they left DuQuoin at eight o'clock in the evening, arrived in Cairo and stayed all night at the Halliday House, Wheeler requesting Bowlin to register his name as Jim Wheeler, claiming that he, Wheeler, could not read or write. Bowlin did so.

The next morning, November 6, 1896, Bowlin and Wheeler took a buggy, and went out on the Mississippi river in the woods above Cairo, and found the Indian with the bricks, which the latter produced. Wheeler produced an instrument with which they bored the bricks and took the borings, whereupon Wheeler and Bowlin returned to Cairo. When they arrived at Cairo they went to a jewelry store. Wheeler alighted from the buggy—Bowlin holding the horse—and went into the store. He returned with a card, which, as he claimed, had been handed to him by the jeweler; and he handed the card to Bowlin to read. The card bore the name of a man, stated to be a government assayer, at the Halliday House. Together they went there and found the man, claiming to be an assayer, and he tested or pretended to test the borings from the bricks, and pronounced them pure gold. Bowlin and Wheeler then returned to DuQuoin on the evening of November 6, and went out to Bowlin's home in the country, and remained during the night. The next morning they returned to DuQuoin together, and went to the First National Bank, where Bowlin drew from the bank \$1500.00. Bowlin and Wheeler then returned to Cairo, and Bowlin took the money with him to the woods in Alexander county, and there delivered the same to Wheeler in exchange for the bricks, Bowlin to have one-third interest in the bricks which were valued at about \$35,000.00, and one-third interest in the mine, for the \$1500.00 paid and his services to be rendered in getting title to the land, on which the mine was located. Bowlin and Wheeler then returned to Cairo where Wheeler left Bowlin, in order, as he said, to take the Indian as far as New Orleans on his return to Arizona. Wheeler was to join Bowlin at Bowlin's home in a few days.

Upon his return to DuQuoin Bowlin became uneasy, and told certain parties of his transaction with Wheeler, and had his bricks examined, and learned that he had been deceived. Bowlin then saw nothing more of Wheeler

until November, 1897, when he went to Keokuk, Iowa, to see a man who had been arrested charged with a similar offense. Arriving at Keokuk he found the plaintiff in error in jail under the name of John Graham. Bowlin identified him as the same man, whom he had known as Jim Wheeler, and who had obtained his money, as above stated, in 1896, just one year before.

The present writ of error is sued out for the purpose of reviewing the judgment so entered by the circuit court.

WILLIAM S. FORREST, and BENJAMIN C. BACHRACH, for plaintiff in error:

An attempt to commit a crime is an intention to commit that crime carried beyond mere preparation and coupled with the doing of an overt act toward it, which is proximate to it but which falls short of the consummation of the crime through circumstances independent of the will of the doer. 1 Bishop on New Crim. Law, secs. 435, 728; 1 B. & H. Lead. Crim. Cases, 9; 1 Wharton on Crim. Law, secs. 173, 181; Clark on Crim. Law, 104; *Cox v. People*, 82 Ill. 191; *Patrick v. People*, 132 id. 529; *Scott v. People*, 141 id. 195; *Thompson v. People*, 96 id. 158; *Stabler v. Commonwealth*, 95 Pa. St. 318; *United States v. Stephens*, 3 Crim. L. Mag. 536; *Commonwealth v. Clark*, 6 Gratt. 675; *People v. Murray*, 14 Cal. 159; *Regina v. Eagleton*, 1 Dearsley, 515.

Careful discrimination should be made between the common law misdemeanor of doing some act toward the commission of a crime and with intent to commit such crime, and the statutory offense of an "attempt to commit" a particular crime, otherwise convictions will be obtained and sustained not within the intention of the legislature. 1 B. & H. Lead. Crim. Cases, 8; *Regina v. Williams*, 1 Den. C. C. 39; *Regina v. St. George*, 9 C. & P. 483; *Regina v. Lewis*, id. 523.

Acts done in pursuance of an intention to commit a crime do not constitute an attempt to commit that crime

unless they are immediately connected with the crime intended. 1 B. & H. Lead. Crim. Cases, 9; *Cox v. People*, 82 Ill. 191; *Patrick v. People*, 132 id. 529; *Regina v. Eagleton*, 1 Dearsley, 515; *Stabler v. Commonwealth*, 95 Pa. St. 318.

Where the substantive crime was committed (in the case at bar, the obtaining of the money by the confidence game,) the defendant cannot be convicted of an attempt to commit that crime. *Queen v. Nichols*, 2 Cox's C. C. 182; *Darrow v. Family Funds Society*, 42 Hun, 245; *Sullivan v. People*, 14 N. Y. Weekly Dig. 239.

The word "attempt," in the statute as well as in common parlance, imports failure. *Darrow v. Family Funds Society*, 42 Hun, 245.

The venue of an attempt to commit a particular crime is in the county where that crime would be committed if consummated. 1 Wharton on Crim. Law, (10th ed.) sec. 195; 28 Am. & Eng. Ency. of Law, 234; *Griffin v. People*, 26 Ga. 493; *Shannon v. Commonwealth*, 14 Pa. St. 226; *Smith v. Commonwealth*, 54 id. 209; *Miles v. State*, 58 Ala. 390; *Brown v. State*, 108 id. 18.

At common law an indictment is insufficient unless all the acts constituting the offense are expressly set forth in the indictment with such certainty as to individualize the transaction for which the accused is to be tried. *Cochran v. People*, 175 Ill. 28; Wharton on Crim. Pl. & Pr. (9th ed.) secs. 220, 221, 223; 1 Bishop on New Crim. Proc. secs. 81, 325, 625-630.

The indictment is also insufficient at common law because it does not contain a specific description of the property obtained or attempted to be obtained, or a legal excuse for not doing so. Property must be described as in indictment for larceny. *Smith v. State*, 33 Ind. 159; *State v. Crooker*, 95 Mo. 389; *State v. Rocheforde*, 52 id. 199; *State v. Reese*, 83 N. C. 637; *State v. Stimson*, 4 Zabr. 1; *People v. Conger*, 1 Wheeler's Crim. Cas. 448; *Markle v. State*, 3 Ind. 535; 2 Bishop on New Crim. Proc. 173; *Redmond v. State*, 35 Ohio St. 81.

At common law an indictment for an attempt to commit a crime must aver the specific act or acts which constitute the attempt, so that the accused may be informed of the precise act or acts which he is called upon to explain or disprove, and have a definite record in the event of a second prosecution, and so that the court may be able to determine, in the event of a preliminary question raised by a demurrer to the indictment or a motion to quash it, whether the acts alleged constitute such an attempt. *State v. Wilson*, 30 Conn. 500; B. & H. Lead. Crim. Cases, 7; 3 Ency. of Pl. & Pr. 97; 2 Wharton on Crim. Pl. & Pr. (9th ed.) secs. 221-223; *Randolph v. Commonwealth*, 6 S. & R. 398; *Thompson v. People*, 96 Ill. 158; *Commonwealth v. Filburn*, 119 Mass. 297; *Commonwealth v. Clark*, 6 Gratt. 575; 1 Wharton on Crim. Law, sec. 190.

"Indictment," in section 8 of the Bill of Rights in the constitution of Illinois, means just what it did at common law. The legislature may change it in form, but it cannot change the substance of its material averments. *Ex parte Slater*, 72 Mo. 102; *State v. Meyers*, 99 id. 107; *Terry v. State*, 109 id. 601.

Section 99 of the Criminal Code is invalid and unconstitutional, because it prescribes a form of indictment which does not inform the defendant of the nature and cause of the accusation against him and which is not due process of law. *Terry v. State*, 109 Mo. 601; 1 Bishop on New Crim. Proc. secs. 81, 84, 86, 88, 519, 566, 627; Wharton on Crim. Pl. & Pr. sec. 220; *United States v. Cruikshank*, 92 U. S. 542; *United States v. Carl*, 105 id. 611; Cooley's Const. Lim. 330, note 3; 2 Hawk. P. C. chap. 25, sec. 111; *State v. Gardner*, 28 Mo. 90; *State v. Rocheforde*, 52 id. 199; *Tully v. Commonwealth*, 4 Metc. (Mass.) 358; *State v. Davis*, 70 Mo. 467; *State v. Kesserling*, 12 id. 565; *Commonwealth v. Phillips*, 16 Pick. 211; *Landringham v. State*, 49 Ind. 186; *McLaughlin v. State*, 45 id. 338; *State v. Learned*, 47 Me. 426; *United States v. Trumbull*, 46 Fed. Rep. 755; *Murphy v. State*, 24 Miss. 590; *Evans v. United States*, 153 U. S. 584; *United States v. Hess*,

124 id. 483; *State v. Brandt*, 41 Iowa, 593; *United States v. Slenker*, 32 Fed. Rep. 691; *United States v. Goggin*, 1 id. 49; *In re Green*, 52 id. 112; *Williams v. People*, 67 Ill. App. 344; *Johnson v. People*, 113 Ill. 102; *Cochran v. People*, 175 id. 28; *United States v. Staton*, 11 Legal News, 191.

EDWARD C. AKIN, Attorney General, (C. A. HILL, B. D. MONROE, and C. R. HAWKINS, of counsel,) for the People:

An indictment charging that money was obtained by means and by use of the confidence game sufficiently describes the offense defined in section 98 of the Criminal Code, by virtue of the express provisions in section 99 that such description shall be sufficient, as well as by the general provision in division 11, section 6, making it sufficient to state an offense in the language of the statute, or so that its nature may be easily understood by the jury. *Maxwell v. People*, 158 Ill. 248; *Morton v. People*, 47 id. 468; *Miller v. People*, 2 Scam. 233; *Cannady v. People*, 17 Ill. 158; *Lyons v. People*, 68 id. 271; *McCutcheon v. People*, 69 id. 601; *Warriner v. People*, 74 id. 346; *Cole v. People*, 85 id. 216; *Fuller v. People*, 92 id. 182; *Kerr v. People*, 110 id. 627; *Seacord v. People*, 121 id. 623; *Loehr v. People*, 132 id. 504; *West v. People*, 137 id. 189.

An indictment which charges the crime substantially in the language of the statute is sufficient. The accused may, however, apply to the court for an order for a bill of particulars, and on the trial the People will be restricted to the items specified. *Williams v. Commonwealth*, 91 Pa. 493.

Attempts to commit crimes are cognizable in the place of the attempt. 1 Wharton on Crim. Law, sec. 288.

Such attempt must be cognizable in the place where the preliminary overt acts constituting the attempt are committed. 1 Wharton on Crim. Law, sec. 195.

To solicit one to commit an offense is an indictable attempt. The indictment must evidently be in the county where the soliciting is done, or at least it must be if the

other takes no step, though the ultimate offense were to be in another county. 1 Bishop on Crim. Proc. sec. 57.

At common law an attempt to commit a felony is a misdemeanor, but where the common law is superseded by a complete criminal code, an attempt to commit a felony is punishable only when it is made so by statute. 1 McLain on Crim. Law, sec. 221.

To constitute an attempt there must be the intent to commit a crime and some act done toward its consummation. The intent alone will not be criminal, but when an act is done towards carrying it out, the law judges not only of the act but of the intent also. 1 McLain on Crim. Law, sec. 222.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This prosecution is based upon section 98 of the Criminal Code, which reads as follows: "Every person who shall obtain, or attempt to obtain, from any other person or persons, any money or property, by means or by use of any false or bogus checks, or by any other means, instrument or device, commonly called the confidence game, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

The indictment was framed under section 99 of the Criminal Code which is as follows: "In every indictment under the preceding section, it shall be deemed and held a sufficient description of the offense, to charge that the accused did, on, etc., unlawfully and feloniously obtain, or attempt to obtain, (as the case may be), from A B, (here insert the name of the person defrauded or attempted to be defrauded), his money (or property, in case it be not money), by means and by use of the confidence game."

The motions, made by the plaintiff in error to quash the indictment and in arrest of judgment, were based upon two grounds. In the first place, it is alleged, that

the indictment is insufficient as not expressly stating all the acts constituting the offense, with which the prisoner is charged, and as thereby failing to inform the prisoner of the nature and cause of the accusation against him. We are of the opinion, however, that the indictment is not invalid for the reason thus urged against it. This court has held in a number of cases that, where an indictment charges that money was obtained by means and by use of the confidence game, such indictment sufficiently describes the offense, defined in section 98 of the Criminal Code, because of the express provisions of section 99 above quoted, and also because of the general provision contained in section 6 of division 11 of the Criminal Code. Said section 6 provides, that "every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of the statutes creating the offense, or so plainly that the nature of the offense may be easily understood by the jury." Said section 6 then gives a form for the commencement of an indictment. Section 98 of division 1, and section 6 of division 11, of the Criminal Code justify the framing of the indictment in the present case in the language in which it is above set forth. (*Morton v. People*, 47 Ill. 468; *Maxwell v. People*, 158 id. 248; *Loehr v. People*, 132 id. 504; *Seacord v. People*, 121 id. 623; *West v. People*, 137 id. 189; *Coffin v. United States*, 156 U. S. 432).

The second ground, upon which the indictment is claimed to be invalid is, that said section 99 is unconstitutional. The constitutionality of this act was considered in *Morton v. People*, 47 Ill. 468, and it was there held that the act, defining, creating and punishing the confidence game, was not in violation of the constitution of the State. Its constitutionality has been recognized by this court in a number of cases decided, since the case of *Morton v. People* was decided. We see no reason for changing the conclusion reached in *Morton v. People, supra*,

and decline to reconsider the grounds, upon which the conclusion arrived at in that case is based.

We are, therefore, of the opinion that the court below committed no error in refusing to quash the indictment, because of the insufficiency of its allegations, or because of the alleged unconstitutionality of the statute under which it was framed.

At the close of the evidence for the State, and again at the close of all the evidence, the plaintiff in error requested the court to give to the jury a written instruction to find defendant not guilty. The court refused to give the instruction so asked, and exception was duly taken.

The instruction No. 23, asked by the plaintiff in error, the defendant below, was refused as asked, but was modified and given as modified. To the giving of the instruction, as modified, exception was duly taken. Instruction No. 23 as asked was as follows:

"The court instructs the jury, that an attempt to obtain money by means of the confidence game consists of the following three elements: *First*, an intention to obtain money by means of the confidence game; *second*, the doing of some act toward the obtaining of money by means of the confidence game; *third*, the failure so to obtain the money. Unless said three elements have been each and all established by the evidence beyond a reasonable doubt, there has been a failure to prove the commission of the crime charged in the indictment."

Instruction 23, as modified and given, is as follows:

"The court instructs the jury that an attempt to obtain money by means of the confidence game consists of the following three elements: *First*, an intention to obtain money by means of the confidence game; *second*, the doing of some act toward the obtaining of money by means of the confidence game; *third*, the failure to so obtain the money in Perry county. Unless the said three elements have been each and all established by the evidence beyond a reasonable doubt, there has been a failure to

prove the commission of the crime charged in the indictment."

The modification made by the court was the insertion of the words, "in Perry county," after the word "money" in the third of the designated elements, constituting an attempt to obtain money by means of the confidence game.

The instruction, as asked by the plaintiff in error, correctly defined an attempt to obtain money by means of the confidence game.

Evidently, section 98 provides for the commission of two separate crimes. One is the crime of obtaining money by means of the confidence game, and the other is the crime of an attempt to obtain money by means of the confidence game. The words are: "every person, who shall obtain or attempt to obtain," etc. The use of the word "or" indicates that two offenses are described. (*United States v. Quincy*, 6 Pet. 464).

All the authorities, to which we have been referred, describe an attempt to commit a crime as consisting of three elements, to-wit: The intent to commit the crime; performance of some act towards the commission of the crime; and the failure to consummate its commission.

In American and English Encyclopedia of Law, (2d ed. vol. 3, p. 250), an attempt to commit a crime is defined to be "an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and possessing, except for failure to consummate, all the elements of the substantive crime." It is also stated in the same text book, that the common elements of every attempt to commit a crime are "a criminal intent coupled with an overt act apparently adapted to effect that intent." (3 Am. & Eng. Ency. of Law,—2d ed.—p. 254). Bishop in his New Criminal Law, (vol. 1, sec. 435,) says: "Whenever a man, intending to commit a particular crime, does an act toward it, but is interrupted, or some accident intervenes, so that he fails to accomplish what he meant, he is still

punishable. This is called a criminal attempt." In Encyclopedia of Pleading and Practice (vol. 3, p. 97,) it is said: "An attempt in criminal law is an effort or endeavor to commit a crime amounting to more than a mere preparation or planning for it, and which, if not prevented, would result in the full consummation of the act attempted, but which in fact does not bring to pass the party's ultimate design." In *Patrick v. People*, 132 Ill. 529, we quoted with approval Bouvier's definition, which is as follows: "An attempt to commit a crime is an endeavor to accomplish it, carried beyond mere preparation, but falling short of the execution of the ultimate design in any part of it." In *Scott v. People*, 141 Ill. 195, it was said: "An attempt is an intent to do a particular thing with an act toward it falling short of the thing intended. When we say that a man attempted to do a thing, we mean that he intended to do, specifically, it, and proceeded a certain way in the doing." (See, also, *Cox v. People*, 82 Ill. 191; *Thompson v. People*, 96 id. 158).

It will be observed, that a failure to consummate the crime is as much an element of an attempt to commit it, as the intent and the performance of an overt act towards its commission. In *United States v. Quincy*, *supra*, the Supreme Court of the United States say: "To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or any definite progress towards it." Wharton in his work on Criminal Law, (vol. 1, sec. 173,) says: "An attempt is an intended apparent unfinished crime. \* \* \* It must be unfinished, as otherwise the indictment would be for the complete crime." Again, in American and English Encyclopedia of Law (2d ed. vol. 3, p. 265,) it is said: "The act must fall short of the completed crime." It is also well settled, that mere solicitations do not prove an attempt. (*Cox v. People*, *supra*; *Thompson v. People*, *supra*).

The plaintiff in error in this case was indicted, not for obtaining money from the prosecuting witness, John A.

Bowlin, but for an attempt to obtain the same. The testimony shows, that the plaintiff in error succeeded in obtaining \$1500.00 in money from the prosecuting witness. Plaintiff in error did not merely attempt to obtain money by means of the confidence game, but he did actually obtain money by means thereof. Here, the indictment charges the plaintiff in error with one offense, to-wit: an attempt to commit a crime, but the proof shows conclusively the completed and consummated commission of the crime, which is another and different offense.

Can a party, who is indicted for an attempt to commit a crime, be convicted under evidence, which shows that he did commit it? This is a question, about which the authorities seem to differ, so far as there are any authorities upon the subject. The general rule at common law was that, when an indictment charged an offense, which included within it any less offense or one of a lesser degree, the defendant, though acquitted of the higher offense, might be convicted of the less. (1 Bishop on New Crim. Law, sec. 1054; *Hanna v. People*, 19 Mich. 316; *State v. Jarvis*, 21 Iowa, 44; *Carpenter v. People*, 4 Scam. 197; *Kennedy v. People*, 122 Ill. 649; *Clifford v. State*, 10 Ga. 422). Thus, in *Kennedy v. People*, *supra*, where one was indicted for an assault with a deadly weapon with intent to inflict bodily injury, it was held that he might be convicted of a simple assault. Here, however, the indictment is not for obtaining money by means of the confidence game, such obtaining being the greater offense, and, therefore, the question is not whether, under an indictment for so obtaining money, a conviction could be had for an attempt to obtain it, the attempt being the less offense. The question here is, whether, where the indictment is for the less offense, proof of the greater will justify a conviction.

In *Queen v. Nicholls*, 2 Cox's Crim. Cas. 182, which was an indictment for an assault with an intent to commit rape, and where the proof showed that the rape was committed, the court held, that the prisoner should be ac-

quitted of the attempt to commit the rape. (Roscoe on Crim. Evidence,—3d ed.—p. 66; *Rex v. Hammon*, 1 East's P. C. 411; Archbold's Pl. & Pr.—10th ed.—485; *Sullivan v. People*, 14 N. Y. Weekly Dig. 239; *Darrow v. Family Funds Society*, 42 Hun, 245). In *State v. Sheppard*, 7 Conn. 54, it was held, that proof of a rape would sustain an indictment for an attempt to commit a rape. The case of *State v. Sheppard* was based mainly upon the case of *Commonwealth v. Cooper*, 15 Mass. 187. The latter case, however, was disapproved of by Chief Justice Shaw in the subsequent case of *Commonwealth v. Roby*, 12 Pick. 496, and was virtually overruled by the latter case. The case of *State v. Sheppard*, *supra*, appears also to be opposed to other authorities, as will appear by a reference to 1 Bishop on New Crim. Law, secs. 788, 804, 809.

Inasmuch as our statute clearly defines the offense of an attempt to obtain money by means of the confidence game as being different and distinct from the offense of obtaining money by means of the confidence game, some force must be given to the provisions of the statute. It would appear to be logical, that, when a man is indicted for a particular offense, he must be proven guilty of that offense, and not of some other. It seems to follow that, if a man can be indicted for an attempt to commit an offense, and, under such indictment, be proven to have been guilty of the consummated offense, it would be unnecessary to make the latter a distinct crime. If proof, that a man obtained money by means of the confidence game, is proper under an indictment against him for an attempt to obtain money by means of the confidence game, then it would seem to be unnecessary in any case to indict him for the offense of obtaining money by means of the confidence game.

But, even if we are wrong in the views above expressed, the modification made of this instruction was erroneous. Instruction No. 23 attempted to define, in general language, an attempt to obtain money by means of

the confidence game. The insertion of the words, "in Perry county," in the manner, in which they were inserted in the instruction, makes it absurd. The words are not inserted after the word "attempt," nor after the first and second elements in which an attempt is stated to consist. The jury may have believed, that the plaintiff in error had the intention of obtaining Bowlin's money by means of the confidence game in Alexander county, where Cairo is located, and that he did an act towards obtaining money by means of the confidence game in Alexander county, but that his failure only was in Perry county. The proof shows that the crime was consummated in Alexander county. The crime, of which the plaintiff in error was guilty, if he was guilty at all, was the obtaining of Bowlin's money; and he obtained it in Alexander county, and not in Perry county. The State cannot split up one crime, and prosecute it in parts. (*Jackson v. State*, 14 Ind. 327). A consummated crime may involve an attempt—a successful attempt—to commit it, but such attempt is merely a part of the completed offense.

Section 9 of article 2 of the constitution says that, in all criminal prosecutions, the accused shall have the right to "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." Section 4 of division 10 of the Criminal Code provides, that "the local jurisdiction of all offenses, not otherwise provided for by law, shall be in the county where the offense was committed." The crime of larceny is made an exception, and the offender may be tried in any county, to which he carries the stolen property, as well as in the county in which the property was first taken. This rule, however, has no application to any crime other than larceny. (Crim. Code, div. 10, sec. 8; *Campbell v. People*, 109 Ill. 565). The statutory offense of doing an act in attempting to commit a crime is punishable in the county where the crime, unless prevented, would have been committed. (28 Am. & Eng.

Ency. of Law, p. 234). An attempt to commit a crime "is cognizable in the place where, if not interrupted, it would have been executed; and from the very nature of things, it must be cognizable in the place where the preliminary overt acts, constituting the attempt, are committed." (1 Wharton on Crim. Law, sec. 195). Instruction 23, as modified, virtually told the jury, that a part of the preliminary overt acts, constituting the attempt, might be committed elsewhere than in Perry county where the indictment was found, and the trial was had. "The offense of attempt is complete in the county where the offense, if consummated, must have been committed." (*Griffin v. State*, 26 Ga. 493).

It is not only clearly shown by the proof in this case, that the crime of obtaining the money by means of the confidence game was perpetrated in Alexander county, and not in Perry county, but also that most, if not all the acts, constituting the preparation for the crime and going to make up the attempt to commit it, were performed in Alexander county. The prosecuting witness was taken to Alexander county; and in that county were found the Indian, and the pretended assayist, and the gold bricks. The act of assaying the ore was done in Alexander county.

It is well settled, that false representations, amounting to false pretences within the meaning of the statute, do not constitute the crime, unless the property has been actually obtained. It is, therefore, generally held, that the crime of false pretences is complete where the goods or moneys are obtained; and that, if the pretences are made within one jurisdiction and the property or money is obtained in another jurisdiction, the person, making the representations, must be indicted within the latter jurisdiction. (7 Am. & Eng. Ency. of Law, p. 758).

In *State v. Shaeffer*, 89 Mo. 271, it was held that the crime, which consists in making use of false pretences, is committed where the money or property is received, and that, in a prosecution for obtaining money or prop-

erty by means of false pretences, the place where the money or property is obtained, without regard to where the representations were made, is the place where the party should be prosecuted.

In *Connor v. State*, 29 Fla. 455, it was held that the receipt of property, obtained under false pretences, is the consummation of the offense, and when the pretences are made in one jurisdiction and the property is obtained by the offender in another jurisdiction, the prosecution should be instituted only in the latter jurisdiction, unless there is a valid statute permitting it elsewhere. (See also *Stewart v. Jessup*, 51 Ind. 413; *State v. House*, 55 Iowa, 466; *Norris v. State*, 25 Ohio St. 217). We see no reason why the same rule, which is applicable to the obtaining of money by false pretences, is not applicable to the obtaining of money by means of the confidence game. If this is so, then this prosecution should have been instituted in Alexander county, and not in Perry county.

If the words, "in Perry county," had not been inserted in instruction No. 23, the jury could not have found the plaintiff in error guilty of an attempt to obtain money by means of the confidence game, because, to do so, they would have been obliged to find that his attempt was a failure, whereas the proof shows, that the attempt was not a failure. The instruction virtually told the jury, that it made no difference whether the money was obtained by means of the confidence game in Alexander county or not, if there was a failure to obtain it in Perry county. In this respect the instruction was clearly erroneous. The law defines an attempt to commit a crime as including the failure to consummate it, as well as the other elements above mentioned, and the law does not necessarily limit such failure to any particular county.

The judgment of the circuit court is reversed, and the cause is remanded to the latter court for further proceedings in accordance with the views here expressed.

*Reversed and remanded.*

## THE CARTERVILLE COAL COMPANY

v.

A. MORTON ABBOTT.

*Opinion filed October 16, 1899.*

1. MINES—liability of mine owner for violation of statute to protect miners. The failure of the owner and operator of a coal mine employing more than six men to place a hand-rail along the stairway in the escapement shaft, as required by section 3 of the act on mines, as amended in 1889, (Laws of 1889, p. 204,) renders such owner or operator liable, under section 14, as amended in 1887, (Laws of 1887, p. 235,) for an injury sustained by an employee and due to such defect, irrespective of the question of contributory negligence, as such statute was passed in compliance with section 29 of article 4 of the constitution.

2. PLEADING—when averment of due care by plaintiff is surplusage. In an action by a miner to recover for personal injuries resulting from a willful violation of the statutory duties prescribed for the protection of miners, in obedience to a mandate of the constitution, which fact is averred in the declaration, a further averment that the plaintiff was in the exercise of due care is surplusage and need not be proved.

*Carterville Coal Co. v. Abbott*, 81 Ill. App. 279, affirmed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Williamson county; the Hon. A. K. VICKERS, Judge, presiding.

Plaintiff received the injury sued for in this case on May 13, 1897, at which time he was in the employ of the defendant, a coal mining corporation, as a blacksmith, and while descending the air or escapement shaft by means of a ladder, fell from the last platform to the bottom, a distance of about eleven feet.

The two counts of the declaration charge the defendant, in effect, with a willful failure to construct or maintain an escapement shaft in the manner provided for by section 3 of chapter 93 of the statutes of Illinois. The second count sets out that section *in totide verba*, and avers that the coal mine was opened in 1890, after the

181	495
184	415
185	418
185	419
181	495
94a	1 5
94a	1 81
95a	1 97
181	495
d191	1 284
192	1 45
f192	1 388
96a	1 258
181	495
196	1 160
100a	1 484
100a	1 547
100a	1 581
181	495
198	1 129
181	495
202	629
e202	1 681
181	495
110a	688
181	495
111a	1 800

passage of the act in force July 1, 1889; that there was provided and maintained, in addition to the main hoisting shaft, a separate escapement shaft from the mine to the surface of the ground, which was used by the defendant as a second means of ingress and egress by means of a system of ladders and platforms, which ladders and platforms were not partitioned off from the main air-way into said mine, and did not have substantial hand-rails or safe means of any kind to protect the lives and persons of the employees of said mine while using the said ladders and platforms; that the defendant suffered dirt to accumulate on the last one of said platforms descending into the mine, making the same to appear to one descending therein as the bottom or ground floor of said mine, but which platform was twelve feet from the bottom of said mine; that the plaintiff was required to enter said mine for the purpose of fixing and repairing a pump therein, and while so descending said escapement shaft, in the exercise of due care and caution, fell and sustained numerous injuries. A verdict and judgment for \$3500 being affirmed in the Appellate Court, this appeal is prosecuted.

It was not contended but that the defendant failed to provide an escapement shaft as required by section 3 of chapter 93 of the act in force July 1, 1889, after the passage of which this mine was opened. The proof showed that about one hundred and twenty-five men were employed in the mine at the time of the accident, and that the escapement shaft had been in use for six or seven years prior to the accident. The appellant contends, however, that there is no proof in the record showing for what length of time preceding May 13, 1897,—the date of the accident,—a greater number of men than six were employed, and that the statute does not apply to a mine which has not, for a year preceding, been operating with a force of six men or more. The proof showed that at times over one hundred men had been employed within the mine, and the jury would have been warranted from

that fact, and the fact that the mining company had in fact constructed an escapement shaft, in concluding that the number of men employed by it brought it within the requirements of the statute. Independently of this, however, the provision of the statute is, as to mines opened after the passage of this act, that one year's time shall be allowed for all shafts two hundred feet in depth or less, time to be reckoned, in all cases, from the date on which coal is first hoisted from the original shaft for sale or use, making it the duty of the inspector to see that all the escapement shafts are begun in time to secure their completion within the time specified.

No peremptory instructions were asked, and the only other questions for consideration by this court are those based upon the giving and refusal of instructions.

The theory of appellant's defense on the trial of this case was, that the plaintiff was not in the exercise of due care and caution for his own safety at the time of the accident. This was alleged in the declaration, and the plea of the general issue traversed that allegation. Witnesses for the defendant testified that the plaintiff admitted, shortly after the accident, that it was partially his own fault,—that "it was my own foolishness." Defendant sought to prove by the engineer that he asked the plaintiff and his helper if they wished to be let down by means of the cage in the mine shaft; that he had steam up and was prepared to let them down in that manner; that plaintiff made no answer, and getting no satisfaction from him, he left; that as the plaintiff's duties required him to go into the mine for different purposes, such as shoeing the mules, fixing the machinery, etc., he at all times had the right to command the use of the cage for purposes of ascent or descent.

Among the instructions given for the plaintiff to which defendant excepted were the following:

7. "That if plaintiff did say he fell and was injured as a result, partly, of his own neglect, yet if the jury believe,

from a preponderance of the evidence, that the plaintiff's injury was occasioned by reason of the willful failure of defendant to partition off the stairway from the main air-way of the escapement shaft and provide substantial hand-rails and platforms for the same, and that such injury would not have occurred but for such willful failure, then the verdict should be for the plaintiff."

4. "That if the jury believe, from a preponderance of the evidence, that on the 18th of May, 1897, defendant was the operator of said coal mine worked by shaft, which had been in operation for more than a year for hoisting coal for sale and use, and there were more than six men employed in such mine, and an escapement shaft had been constructed in addition to the hoisting shaft, and said mine was less than one hundred feet in depth, but defendant willfully failed to provide such escapement shaft with stairways partitioned off from the main air-way, having substantial hand-rails and platforms, and by reason of such willful failure the plaintiff, while in the employ of defendant in said mine, fell to the bottom of said shaft and was injured, the verdict should be for the plaintiff."

All the instructions asked by the defendant were refused, to which it excepted. They were as follows:

1. "The jury are instructed that an employer is not required to exercise any greater degree of care for the preservation and safety of his employee than the employee exercises on his own behalf, and that all risk knowingly assumed by the employee is incident to the service that he enters, and is supposed by him to be voluntarily assumed, and to form a portion of the consideration for the wages which he charges for his services.

2. "The jury are further instructed that an employee cannot recover damages for the alleged negligence or carelessness of his employer unless he is shown to have been in the exercise of due care himself at the time of receiving the injury complained of.

3. "The jury are also instructed that where an employee is fully acquainted with the machinery and construction provided by the employer and with or about which the employee renders his services, and voluntarily, after possessing such knowledge of any imperfection or defect of construction or appliances of the business in which he is engaged, remains in the service of his employer, he cannot recover damages for such imperfections of construction or implements as he was aware of at the time of the alleged injury.

4. "The jury are also instructed that where an employer fails to provide such precautions against possible injury to his employees as the statutes of the State or the common law require him to provide, still, if the employee is fully acquainted with such omission on the part of the employer, and voluntarily exposes himself, in the rendering of his services, to the hazards consequent upon the omission of the employer to conform to the law, the employee will be presumed to have voluntarily assumed the risk to which he was exposed and of the existence of which he had such knowledge, and he cannot recover for damages from such source.

5. "The jury are further instructed that although it may appear, from the evidence, that the defendant failed to observe and comply with the statutory requirements in the construction of means of access to and from the mine, yet this would not excuse the plaintiff from establishing, by competent evidence, that at the time of receiving the alleged injury he was himself in the exercise of due care for his own safety.

6. "The jury are further instructed that before a person can recover on account of negligence in the performance of a statutory duty on the part of another, it must appear, not only that the injury complained of was the result of such negligence, but it must also appear that the injured party was at the time in the exercise of due care."

CLEMENS & WARDER, for appellant.

DUNCAN & RHEA, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

It was said in the case of *Calumet Iron and Steel Co. v. Martin*, 115 Ill. 358: "From the earliest reported case in our Reports where the question was passed upon, to the present time,—a period of more than thirty years,—the general rule has been declared and recognized in opinions announced from time to time, that in order to recover for injuries from negligence it must be alleged and proved that the party injured was, at the time he was injured, observing due or ordinary care for his personal safety," and many cases are cited of the decisions of this court prior to that adjudication sustaining that rule. Since that opinion was announced numerous cases have been decided in which the same rule has been sustained. To this rule, however, there is a distinct and positive exception, growing out of the provisions of section 29 of article 4 of the constitution of this State, which is as follows: "It shall be the duty of the General Assembly to pass such laws as may be necessary for the protection of operative miners, by providing for ventilation when the same may be required, and the construction of escapement shafts, or such other appliances as may secure safety in all coal mines, and to provide for the enforcement of said laws by such penalties and punishments as may be deemed proper."

The legislation of this State enacted for the purpose of complying with the above provision of the constitution, provides for certain duties to be performed by the mine owner or operator with reference to the construction of an escapement shaft, ventilation, bore-holes, and for operating hoist-ways and the like, designed for the protection and safety of miners. By section 3 of "An

act providing for the health and safety of persons employed in coal mines," in force July 1, 1879, it is provided that when more than six men are employed, escapement shafts are required to be constructed, and "such escape-  
ment shafts as shall be equipped after the passage of this act shall be supplied with stairways partitioned off from the main air-way, and having substantial hand-rails and platforms, and such stairways shall be at an angle of not greater than forty-five degrees." Section 14 of that act, as amended and in force July 1, 1887, is as follows: "For any injury to person or property occasioned by any willful violations of this act or willful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby; and in case of loss of life by reason of such willful violation or willful failure, as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children, or to any other person or persons who were before such loss of life dependent for support on the person or persons so killed, for a like recovery of damages for the injuries sustained by reason of such loss of life or lives, not to exceed the sum of \$5000."

By this latter section, for an injury to person or property, or for loss of life, occasioned by a willful violation of any of the provisions of the act providing for the health and safety of persons employed in coal mines, the operator is made liable in damages. An enactment such as this, which is in force by the mandatory requirement of the constitution, is of the gravest import and of the highest character, and must necessarily be construed in connection with the constitutional provision requiring the enactment. Where so large a number of persons are engaged in a productive industry as in coal mining in the State of Illinois, and where the work is of such a character that it is recognized as being attended with unusual hazards and dangers, the constitution requires that legislation shall be had for the purpose of protecting those

thus engaged from the known extraordinary hazards and dangers. In the construction and equipment of mines, therefore, the act requires the discharge of specific duties, so that the utmost safety can be extended to the miners. This requirement of the constitution is sought to be met by this legislation, which directs the owner, operator or manager to make provision for the safety of the miners employed within the mine.

Where an owner, operator or manager so constructs or equips his mine that he knowingly operates it without conforming to the provisions of this act, he willfully disregards its provisions and willfully disregards the safety of miners employed therein. Where such owner, operator or manager willfully disregards a duty enjoined on him by legislation of this character, and places in danger the life and limbs of those employed therein, he cannot say that because one enters a mine as a miner with knowledge that the owner has failed to comply with his duty, he is guilty of contributory negligence. Neither can it be said that by using the means provided by the owner, operator or manager for entering the shaft the miner is guilty of contributory negligence. Mere contributory negligence on the part of a miner will not defeat a right of recovery where he is injured by the willful disregard of the statute, either by an act of omission or commission, on the part of the owner, operator or manager. To hold that the same principle as to contributory negligence should be applied in case of one who is injured in a mine because the owner, operator or manager totally disregarded the statute, as in other cases of negligence, is to totally disregard the provisions of the constitution, which are mandatory in requiring the enactment of this character of legislation, and would destroy the effect of the statute and in no manner regard the duty of protecting the life and safety of miners.

A willful disregard by the employer of a duty imposed is a willful exposure to liability to injury of the employee,

and is an act of negligence of so gross a character and so utterly in disregard of law that the question of contributory negligence, merely, has no place in the case as relieving such owner, operator or manager from liability for an injury which has resulted solely from the fact of such negligence. Under the evidence in this record it appears the escapement shaft was not partitioned off from the main air-way, nor was the stairway provided with substantial hand-rails, nor was the platform protected by railing. This escapement shaft is shown to have been used by employees in entering into and passing from the mine. The duties of the blacksmith required him to enter the mine at various hours for the purpose of discharging the various duties incumbent on him, and he was in the habit of using, for the purpose of entering or departing from the mine, the stairway provided by the defendant company. The evidence shows that had the stairway and platforms been protected by hand-rails it is utterly improbable that the injury could have resulted in the manner it did. The neglect of the defendant to discharge its duty in providing hand-rails was the cause from which the injury resulted, and it is not to be excused by any mere contributory negligence on the part of the plaintiff.

If one is injured as a result of some act of negligence on the part of the mine owner other than failure to comply with specific duties required by the statute, then the person injured must have been in the exercise of ordinary care before he can maintain an action, and must allege and prove that he was in the exercise of such care. The rule is different, however, under this legislation, where there is a willful failure to comply with the provisions of the statute, and the right of recovery cannot depend, in such case, on the exercise of ordinary care by the person injured, nor can he be precluded by mere contributory negligence. This legislation fixes a broad and distinct exception from the general rule.

It was not error to refuse the instructions asked by the defendant or to give those asked by the plaintiff.

The principles here announced are sustained by *Bartlett Coal and Mining Co. v. Roach*, 68 Ill. 174, *Litchfield Coal Co. v. Taylor*, 81 id. 590, and *Catlett v. Young*, 143 id. 74.

Even though the declaration avers the plaintiff was in the exercise of due care and caution, yet where the evidence discloses the fact that the injury resulted from the willful violation of the statutory duties prescribed for the protection of miners, and that fact was averred in the declaration, the simple averment of due and ordinary care does not entail the additional duty of proving the same, and is surplusage.

It is clear the plaintiff was entitled to recover, and as we find no error in the record the judgment of the Appellate Court for the Fourth District is affirmed.

*Judgment affirmed.*

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DINAH MEADOWCROFT *et al.*

*v.*

WINNEBAGO COUNTY *et al.*

*Opinion filed October 16, 1899.*

1. **STATUTES**—*terms used in a statute without explanation are given their common law meaning.* Terms contained in a statute without explanation as to the sense in which they are employed should be construed in accordance with their common law significance.

2. **ALIENS**—*one cannot claim estate of a bastard if kinship is traced through alien blood.* One who claims the estate of an illegitimate intestate under clause 5 of section 2 of the Statute of Descent, (Rev. Stat. 1874, p. 418,) as next of kin to the mother of such intestate, is not entitled to take, when compelled to trace kinship through alien blood.\*

3. **SAME**—*Alien act of 1887 applies to estates of illegitimates.* The provisions of act of 1887, (Laws of 1887, p. 5,) in respect to the right of

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\*The authorities on inheritance by, through or from illegitimate persons are reviewed in a note to *Croan v. Phelps*, (Ky.) 23 L. R. A. 753, while those on an alien's right to inherit are in a note to *Easton v. Huolt*, (Iowa,) 31 L. R. A. 177.

aliens to take and hold real estate, are applicable to the estates of illegitimates as well as legitimates.

4. SAME—*Alien act of 1897 does not affect prior vested rights by way of escheat.* The right to trace heirship to the property of an intestate through alien ancestors, conferred by section 1 of the Alien act of 1897, (Laws of 1897, p. 5,) is not applicable to property the title to which had passed by escheat to the State prior to that act.

5. ESCHEATS—*act of 1874 supersedes all previous enactments on escheats and applies to illegitimate intestates.* All previous enactments in relation to escheats were superseded by the act of 1874, (Rev. Stat. 1874, p. 479,) under section 1 of which the property of illegitimates, dying without heirs capable of holding the same, escheats to the county and not to the State, as is specified in clause 6 of section 2 of the act on descent.

APPEAL from the Circuit Court of Winnebago county; the Hon. CHARLES E. FULLER, Judge, presiding.

S. H. CUMMINS, for appellants:

The object of the framers of the Statute of Descent, concerning illegitimates, seems to have been to remove the common law disability of inheritance by illegitimates through the maternal line. *Bales v. Elder*, 118 Ill. 436.

Legislation giving to illegitimate children the right of succession is in derogation of the common law and should be strictly construed. *Pratt v. Atwood*, 108 Mass. 40; 24 Am. & Eng. Ency. of Law, 414.

A statute in derogation of the common law, which is not clearly remedial, should be strictly construed. *Rothgerber v. Dupuy*, 64 Ill. 451; *Finley v. Steele*, 23 id. 56.

The sixth clause of the second section of the Statute of Descent provides, with respect to illegitimate intestates, that "when there are no heirs or kindred the estate of such person shall escheat to the State, and not otherwise." That statute was not repealed by the Statute of Escheats in force July 1, 1874.

Repeals by implication are not favored. *Pavey v. Utter*, 132 Ill. 489; *Crerar v. Williams*, 145 id. 625.

A general statute without negative words will not repeal particular provisions of a former statute unless the

two statutes are irreconcilably inconsistent. *Covington v. East St. Louis*, 78 Ill. 548; *Gunnarssohn v. Sterling*, 92 id. 569; *Holton v. Daily*, 106 id. 131.

A general statute does not operate as a repeal of a former particular statute. *Hyde Park v. Cemetery Ass.* 119 Ill. 141.

ARTHUR H. FROST, for appellee the county of Winnebago:

The common law rule that one citizen cannot inherit from another where kinship must be traced through a non-resident alien cannot be rejected as repugnant to our institutions under a statutory adoption of the common law, so far as applicable. A statutory provision that an estate shall descend in equal parts to the next of kin does not make the descent to collateral kindred immediate, so as to avoid the effect of alienage of ancestors through whom kindred is traced. *Beavan v. Went*, 156 Ill. 592.

Wherever the statute does not expressly or by necessary implication remove the common law incapacity the common rule still prevails. *Bent v. St. Vrain*, 30 Mo. 268; *Stephenson's Heirs v. Sullivant*, 5 Wheat. 260; *Little v. Lake*, 8 Ohio, 290; *Remington v. Lewis*, 8 B. Mon. 606.

There is no distinction whether the alien ancestors, through whom the lineage must be traced, are living or dead. *Beavan v. Went*, 156 Ill. 592; *Lessees of Levy v. McCarty*, 6 Pet. 102.

No one can acquire title to property by descent through an alien who was himself incapable of holding title. *Walker v. Ferry Co. McArthur*, (D. C.) 440; *Elden v. Doe*, 6 Blackf. 341; *Murray v. Kelly*, 27 Ind. 42; *Furenes v. Mickleson*, 86 Iowa, 508; *Redpath v. Rich*, 3 Sandf. 79; *Wright v. M. E. Church*, Hoff. Ch. 202; *Jackson v. Greene*, 7 Wend. 383; *McCarty v. Marsh*, 5 N. Y. 269; *Jackson v. Fitzsimmons*, 10 Wend. 9; *McDaniel v. Richardson*, 1 McCord, 187; *Jackson v. Sanders*, 2 Lee, 109.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Richard Horsefall, a naturalized citizen of the United States, died intestate in Winnebago county, Illinois, February 1, 1894, leaving no widow, child or children, and no descendants of a child or children, seized in fee of certain real property in said county. Thereafter escheat proceedings were begun by the county under the provisions of chapter 49 of our statute, in which the deceased was found to have left no heirs and his property declared to escheat to the county. Subsequently, July 28, 1897, this suit was begun in the circuit court of that county, on the chancery side, under the provisions of chapter 49, *supra*, by certain persons, seeking to have the lands previously forfeited relinquished to them, as heirs-at-law. On May 14, 1898, the bill was amended, and the appellants, Dinah Meadowcroft and her husband, made the sole complainants. As amended it alleged that Richard Horsefall, the intestate, was the illegitimate son of Susan Horsefall, who was the daughter of another Richard Horsefall, the brother of John and William Horsefall; that the brother John was the father of James Horsefall, the father of Sally Horsefall-Clegg, who was the mother of the complainant Dinah Meadowcroft, who is the next of kin of the intestate and was a naturalized citizen of the United States at the time of intestate's death. It also appears from the bill that he had other relatives of the same or nearer degrees to him than the complainant Dinah Meadowcroft, but they are now dead or are aliens incapable of inheriting. The answer of the county denied the allegations of the bill as to relationship, but admitted the death, citizenship, residence, seizure and intestacy of Richard Horsefall, as alleged, and averred that if complainant Dinah Meadowcroft is related to him she is compelled to trace her kinship through alien ancestors, and for that reason is not entitled to take the estate. After the introduction of a large volume of evidence on the question of her kinship to deceased, the court decided

that her claim of inheritance could not be sustained and dismissed the bill at complainants' cost. From that decree this appeal is prosecuted.

The principal contention of the county on the trial was, that as complainant Dinah Meadowcroft was compelled to trace her kinship to the intestate through alien blood, she is precluded, under the act of 1887 in regard to aliens, from inheriting his property, and the chancellor hearing the cause so held. The act, applied to next of kin of legitimates who must trace their relationship to the intestate through alien ancestors, was before us in *Beavan v. Went*, 155 Ill. 592, and we there said, on the authorities cited (p. 607): "We are of the opinion, then, that as the complainant is compelled to trace his descent from the intestate through non-resident aliens, he is barred and incapacitated from taking any interest in the real estate by inheritance."

Appellants' counsel insist that this case is distinguishable from that, for the reason that this is not, as they claim, a common law inheritance, but purely a statutory one, there being no common law right of inheritance from or through illegitimates, except to lineal heirs. It is therefore contended the common law rule applied in the *Beavan case* has no application. The law of descent as to illegitimates, as it existed at common law, is certainly materially changed by our statute; but the same is true as to legitimates, and no good reason is or can be shown why the common law rules, so far as applicable, should not be applied to one as well as the other. The rights of aliens, under our statute of 1887, are not the same, in all respects, as they were at common law, and yet the common law rule as to tracing kinship through non-resident aliens was held applicable in the case cited. Beavan claimed under the fifth clause of section 1 of chapter 39 of the statute, the language being, "then such estate shall descend in equal parts to the next of kin of the intestate, in equal degree, (computing by the rules of the

civil law.") Complainants in this case claim under the fifth clause of section 2 of chapter 39, which is: "In case there is no heir, as above provided, the estate of such person shall descend to and vest in the next of kin to the mother of such intestate, according to the rule of the civil law." As we understand the position of counsel in this case, it is that the right of Dinah Meadowcroft to take the estate does not depend upon any right of her ancestors to do so, but she takes directly through the intestate as next of kin capable of inheriting. The same contention was made in *Bearan v. Went, supra*. It was there argued, that "while the right to inherit comes to him (the complainant) mediately through some person who was an alien, the statute casts the estate directly upon him." And again: "That appellant is not allowed by the laws of this State to trace his inheritable blood through alien ancestors for the purpose of taking title to the real estate mentioned in the bill by descent, we submit is not the law of this State and never has been, and in support of our contention we refer to the following authorities,"—citing cases. The language applicable to this case (the fifth clause, *supra*), is: "The estate of such person shall descend to and vest in the next of kin of the mother," etc. The words "*shall descend to and vest in*," are substantially the same as in the fifth clause of the first paragraph, and in both the term "descent" means "the title by which one person, upon the death of another, acquires the real estate of the latter as his heir-at-law." "Heir, at common law: he who is born or begotten in lawful wedlock, and upon whom the law casts the estate in lands, tenements or hereditaments immediately upon the death of his ancestor." "In civil law: he who succeeds to the rights and occupies the place of a deceased person." (Bouvier's Law Dic.)

"The term 'heir' has a very different signification at common law from what it has in those States and countries which have adopted the civil law. In the latter,

the term applies to all persons who are called to the succession, whether by the act of the party or by operation of law. The person who is created universal successor by a will is called the testamentary heir, and the next of kin by blood is, in cases of intestacy, called the heir-at-law or heir by intestacy." 1 Brown on Civil Law, 344; Story on Conflict of Laws, 508.

In *Carpenter v. State*, 4 How. (Miss.) 163, (34 Am. Dec. 116,) Smith, J., said: "It is a general rule that where terms used in the common law are contained in the statute or the constitution, without an explanation of the sense in which they are there employed, they should receive that construction which has been affixed to them by the former." Under this rule, if the ordinary legal meaning is given to the words of our statute relating to illegitimate, the common law, so far as applicable, must become a part of the statute.

It is again urged that this statute is in derogation of the common law, by which the estate of an illegitimate escheated to the crown in the event of a failure of lineal descendants, and should be strictly construed. The general rule that statutes in derogation of the common law are to be strictly construed has been repeatedly recognized by this court, and its application to statutes similar to the one under discussion by those States recognizing that rule is not doubted. But we are unable to see wherein appellants' contention in this case is thereby aided. No good reason is, or, as we believe, can be, shown why one claiming from a relative cannot inherit, if compelled to trace his kinship through alien ancestors, when the relative is legitimate, but can if he is illegitimate. The object of the act of 1887 is to limit the power of aliens, or, as construed in the *Beavan case*, those claiming through aliens, to acquire lands in this State, and that statute, with all the rules of construction applicable thereto, should be applied to the estates of illegitimate as well as legitimate.

Appellants also invoke the aid of the later act of 1897, (Laws of 1897, sec. 1, p. 6,) to enable Dinah Meadowcroft to trace her heirship to the property of the intestate through alien ancestors. That act provides that "no person shall be deprived of his right to take title to real estate as heir-at-law, by descent from any deceased person, because he may be \* \* \* compelled to trace his relationship to such deceased person through one or more aliens;" but we cannot see how it can be applied to this case, the title to the property in question having vested prior to its taking effect. As already stated, the intestate died February 1, 1894. In *Wallahan v. Ingersoll*, 117 Ill. 123, we said: "When the owner of property dies intestate, without heirs capable of inheriting it, the title thereof devolves, by operation of law, upon the State,"—citing *Crane v. Reeder*, 21 Mich. 24, *Dow v. Ohanlon*, 1 N. J. 582, *Commonwealth v. Hite*, 6 Leigh, 588, and *People v. Culroy*, 8 Johns. 1. (See, also, sec. 1 of chap. 49, *supra*.) This principle was again recognized in *Wunderle v. Wunderle*, 144 Ill. 40, where we said, "that for information of title or as a means of proving title by escheat it was necessary that the provisions of the statute concerning escheats be complied with." Therefore, the subsequent act cannot be held applicable here without divesting or impairing vested rights, to hold which would render the act unconstitutional and void.

Appellants further contend that by the Escheat law of 1872 the estates of illegitimates dying without heirs or kindred escheated to the State, and that the law of 1874, making general provisions for escheats to go to the county in which the greater portion is situated, did not affect the law in force then, concerning illegitimates dying without issue, etc. Assuming this position to be sound, they contend the State had a right to pass the law of 1897, impairing its own rights. As to the conclusions sought to be thus drawn, it is sufficient to say that the act of 1897 does not in anywise purport to divest the title

to property, even if the title were held to be in the State. But we are convinced that section 1 of chapter 49, entitled "Escheats," (Starr & Cur. Stat. p. 1058,) was intended to supersede all previous enactments in relation to that subject, and hence the law now is that the property of illegitimates dying without heirs capable of holding the same escheats to the county and not to the State. That the escheat proceedings may have been defective is immaterial under the views here expressed.

The decree of the circuit court must be affirmed.

*Decree affirmed.*

181	512
191	571

THE ILLINOIS STATE BOARD OF HEALTH

*v.*

THE PEOPLE *ex rel.* Millard F. Bailey.

*Opinion filed October 19, 1899.*

APPEALS AND ERRORS—*appeal lies to Appellate Court if only the construction of a statute is involved.* In a case involving merely the construction of a statute, but not its validity, a writ of error to reverse the judgment of the circuit court should not be sued out in the Supreme Court if no other grounds of jurisdiction exist, but an appeal should be taken to the Appellate Court in the first instance.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. JAMES GOGGIN, Judge, presiding.

JOHN A. BARNES, (H. J. HAMLIN, of counsel,) for plaintiff in error.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This was a petition for *mandamus* brought by Millard Filmore Bailey in the circuit court of Cook county, against the State Board of Health, to compel the board to issue him a license for the practice of medicine in this State. The defendant answered the petition, and on a hearing

on the pleadings and evidence the court granted the writ. To reverse the judgment of the circuit court the State Board of Health sued out a writ of error in this court.

Under the act of June 16, 1887, (Hurd's Stat. 1897, p. 1073,) the State Board of Health adopted certain rules under which persons might be permitted to practice medicine in this State. Upon an examination of the record it will appear that the only questions presented are,—first, what construction shall be placed on the statute as to the powers of the board; and second, whether the petitioner complied with the rules of the board so as to entitle him to a license to practice medicine in this State. It is therefore plain that this court has no jurisdiction to entertain this writ of error; that the writ should have been sued out in the Appellate Court. In cases involving merely the construction of a statute,—not its validity,—and none of the other conditions existing necessary to give the right of appeal or writ of error directly from the trial court to the Supreme Court, the latter court will have no jurisdiction. The appeal in such case should in the first instance be taken to the Appellate Court. (*Gross v. People ex rel.* 95 Ill. 366.) Since the Appellate Court was created this court has jurisdiction in civil cases in which the validity of a statute is involved, but where the mere construction of a statute arises the case must in the first instance go to the Appellate Court. Here no question is raised as to the validity of the statute, nor is it claimed that it violates any provision of the constitution. The plaintiff in error has therefore chosen the wrong tribunal. If the State board desires to review the judgment of the circuit court the writ of error must be sued out from the Appellate Court.

The writ of error will be dismissed.

*Writ dismissed.*

## MARY SAEGER

v.

WILLIAM BODE *et al.**Opinion filed October 19, 1899.*

181 514  
 192 4 57  
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 199 1489  
 181 514  
 202 1284  
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 211 482  
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1. WILLS—when devise is subject to construction under section 13 of the Conveyance act. A devise without words of inheritance, although sufficient, under section 13 of the Conveyance act, (Rev. Stat. 1874, p. 275,) to invest the devisee with an absolute estate in fee, is subject to construction in connection with another clause which may reduce her interest to a life estate.

2. SAME—remainder may be limited on life estate with power of disposal. A remainder may be limited after the termination of a life estate given to the first taker with power to sell and convey the fee.

3. SAME—a general clause must give way to a specific one. A general clause in a will giving all the testator's estate to his wife is limited and restricted by a specific clause immediately following it, which describes the homestead farm.

4. SAME—when subsequent clause will not reduce devise of fee to a life estate. After a devise of the testator's homestead farm in fee to his wife without words of inheritance, a subsequent clause expressing a desire that his daughter have all his estate not disposed of in the above bequest at the death of the wife contemplates such portion of the estate as the testator did not dispose of, and is insufficient to reduce the grant to the widow to a life estate.

WRIT OF ERROR to the Circuit Court of Monroe county; the Hon. WILLIAM HARTZELL, Judge, presiding.

This is a bill, filed by the defendants in error, William Bode and Frederick Jobusch, on August 24, 1898, for the partition of 60.04 acres of land in Monroe county, alleging that the complainants are owners of an undivided one-third part of the land, and making defendants thereto the plaintiff in error, Mary Saeger, and her brother, William Saeger, as the owners of the other undivided two-thirds thereof, and, also, making defendants thereto certain of the defendants in error, holders of mortgages upon the whole of the premises, and upon the undivided one-third thereof alleged to be owned by the plaintiff in error, Mary Saeger. The plaintiff in error, Mary Saeger,

one of the defendants to the bill in the court below, filed a general and special demurrer to the bill after the same had been amended. The demurrer was overruled, and the plaintiff in error elected to stand by her demurrer. And, thereupon, the cause came on for hearing, and the court rendered a decree, finding that the defendants in error, Bode and Jobusch, complainants below, were entitled in fee to an undivided one-third of the premises; that the defendant in error, William Saeger, and the plaintiff in error, Mary Saeger, were each entitled in fee to an undivided one-third interest thereof as heirs of their mother, Charlotte Saeger. Commissioners were appointed, who made their report, and a decree of sale of the premises was entered.

The present writ of error is sued out from this court for the purpose of reviewing the decree so entered by the circuit court.

The bill alleges that one Moritz Saeger died testate on July 25, 1873, owning the premises described in the bill. His will, dated July 16, 1873, is attached as an exhibit to the bill and made a part thereof. In his lifetime, and on January 21, 1871, Moritz Saeger and his wife, Charlotte Saeger, executed a mortgage upon the whole of the premises to one Welsch, which mortgage, by assignment, afterwards became the property of the defendant in error, Mina Hoffman, and she and her husband, Jacob Hoffman, were made defendants. The plaintiff in error, Mary Saeger, claiming to be the owner of an undivided one-third interest in the premises, executed a mortgage upon such interest to one Louis Fauss, Jr., who was made a defendant below, and is one of the defendants in error here.

The bill further alleges that Moritz Saeger, by the ninth clause of his will, gave his wife Charlotte Saeger all his estate, both real and personal, and that said Charlotte Saeger, his wife and devisee, died intestate on February 29, 1896, seized in fee of the land described in the

bill, and left, as her children and only heirs-at-law, Christian Muether, William Saeger, and Mary Saeger; and that her children, at her death, became seized in fee in equal shares as tenants in common of the premises in question, subject to the mortgage given by Moritz Saeger, and owned by the defendant in error, Mina Hoffman.

The bill further alleges that Bode and Jobusch, constituting the firm of Bode & Jobusch, obtained a judgment against Christian Muether, levied upon his one-third interest in the premises, and that on May 15, 1897, said one-third interest was sold at public sale by the sheriff to the said Bode & Jobusch; and that, on August 17, 1898, the sheriff executed a sheriff's deed to Bode & Jobusch, conveying the undivided one-third part of said premises, alleged to have been inherited by Christian Muether from his mother, Charlotte Saeger.

Moritz or Maurice Saeger provides in the first clause of his will, that all his just debts shall be paid; in the second, third, fourth, fifth, sixth and seventh clauses thereof, he gives the sum of five dollars to each of certain of his sons and daughters; by the eighth clause, he gives to his daughter, the plaintiff in error, Mary Saeger, the sum of five dollars; and the ninth and tenth clauses of said will, over which the present controversy arises, are as follows:

*"Ninth—I devise, give, and bequeath to my wife, Charlotte Saeger, all my estate, both real and personal, of all kind and description whatsoever as her sole property forever, and known and described as my homestead farm, where I now reside, and situate in Monroe county and State of Illinois.*

*"Tenth—My desire is that my daughter, Mary Saeger, have all the estate, not disposed of in the above bequeath, at the death of my wife, Charlotte Saeger."*

The will named no person as executor thereof.

The special demurrer to the bill charges, that there is a variance between the bill and the will of Moritz Saeger set out as an exhibit thereto.

The special ground of demurrer is stated in the following words, to-wit: "The bill alleges that the lands therein described belong to the three heirs of the mother, whereas the will shows that all the property not disposed of at the mother's death is to go and belong to this defendant, Mary Saeger, and no other parties have any interest in the land whatever except the mortgagees."

**E. P. SLATE, (A. C. BOLLINGER, of counsel,) for plaintiff in error.**

**JOSEPH W. RICKERT, for defendants in error.**

**Mr. JUSTICE MAGRUDER** delivered the opinion of the court:

The material question in this case arises out of the construction to be given to the ninth and tenth clauses of the will of Moritz Saeger, deceased, and is whether his widow, Charlotte Saeger, took a fee simple title to the premises described in the bill, or whether her interest in said premises under the will was merely a life estate with power of disposition during her life. Though the bill is inartistically drawn and somewhat indefinite in its terms, we infer from its allegations, that the land described therein is the same land, as that referred to in the ninth clause of the will as the homestead farm.

The contention of the plaintiff in error is that the testator, Moritz Saeger, intended by his will to give his widow, Charlotte Saeger, the right to dispose of all the testator's property during her lifetime, if she deemed it necessary and proper to do so, but that he further intended, that whatever part of the property willed to her should remain at her death should go to his daughter, Mary Saeger. This construction of the will assumes, that the words, "not disposed of," in the tenth clause of the will refer to a disposition to be made by the widow, Charlotte Saeger, and, under this view, that, if any of

the property mentioned in the ninth clause should remain undisposed of by Charlotte Saeger at her death, it should go to the daughter, Mary Saeger. If this construction of the will were a correct one, it would follow that Charlotte Saeger took a life estate only with power to dispose of the property during her life; and Mary Saeger took the remainder, subject to the life estate of her mother, and subject to the power of disposition in her mother.

It will be noticed, that the gift, which was granted to Charlotte Saeger, as contained in the ninth clause of the will, does not make use of the word "heir," or of other words of inheritance. Therefore, under section 13 of the Conveyance act, the ninth clause of the will, although sufficient to invest the widow with an absolute estate in fee, would be subject to construction in connection with the tenth clause of the will. If the tenth clause of the will shows an intention to give the widow merely a life estate, she would be held to have taken such an estate, notwithstanding the words in the ninth clause, standing by themselves, may have invested her with an absolute estate in fee. (*Giles v. Anslow*, 128 Ill. 187). Where a life estate is given to the first taker with power of selling and conveying the fee, the remainder may be limited after the termination of the life estate. (*Kaufman v. Breckinridge*, 117 Ill. 305). In such case, the doctrine, that, where there is a devise of an unlimited power of disposition of an estate in such manner as the devisee may think fit, a limitation over is inoperative and void by reason of its repugnance to the principal devise, has no application. As is said by Chancellor Kent, (4 Kent's Com.—8th ed.—p. 603, marg. 526): "If an estate be given to a person, generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker the estate for life only, and annexes to it a power of disposition of the reversion. In that case, the express limitation for life will control the operation of the power, and prevent it from enlarging the estate

to a fee." (*Hamlin v. United States Express Co.* 107 Ill. 443; *In re Estate of Cashman*, 184 id. 88; *Henderson v. Blackburn*, 104 id. 227; *Skinner v. McDowell*, 169 id. 365; *Mann v. Martin*, 172 id. 18).

It has been held, that, in such cases, the use in the will of such words as these, "in case anything be left after her death," implies a power of disposition by the widow of the whole property devised; (*Henderson v. Blackburn*, *supra*; *In re Estate of Cashman*, *supra*; *Skinner v. McDowell*, *supra*); and we are inclined to think that a similar construction would be given to the words, "not disposed of," in the will of Moritz Saeger, if those words referred to a disposition by the widow, Charlotte Saeger. The more natural construction of the words in question, however, is, that they refer to the disposition of the property by the testator himself. The tenth clause of the will is as follows: "My desire is that my daughter, Mary Saeger, have all of the property, not disposed of in the above bequeath, at the death of my said wife, Charlotte Saeger." If the words, "in the above bequeath," qualified the verb, "have," and not the words, "not disposed of," the contention of the plaintiff in error would commend itself as having much force. Under that construction, the tenth clause would read: "My desire is that my daughter, Mary Saeger, have all the estate in the above bequeath not disposed of at the death of my said wife." But this construction involves the arbitrary transposition of the words in the clause. The words, "in the above bequeath," qualify the words, "not disposed of," and refer to the previous clauses of the will, including the ninth clause. The disposition made in the previous clauses was made by the testator himself. His intention, as expressed in the tenth clause, would seem to have been to give to his daughter whatever estate he had not already disposed of in the previous clauses of his will. This view receives confirmation from the peculiar phraseology used in the ninth clause.

By the ninth clause the testator devises, gives, and bequeaths to his wife "all my estate, both real and personal, of all kind and description whatsoever as her sole property forever." If the ninth clause had stopped with the word "forever," there would undoubtedly have been given to the widow all the property of the testator, but the ninth clause, after the word "forever," adds the following words: "and known and described as my homestead farm, where I now reside, and situate in Monroe county and State of Illinois." The latter words evidently limit the general devise of the estate, real and personal, to the homestead farm, where the testator then resided. His intention evidently was to give to his widow his homestead farm, together with such personal property as was located thereon. The general clause, giving all the estate to the wife, is limited and restricted by the specific clause describing the homestead farm. It is a familiar rule in the construction of wills, that general provisions must give way to specific provisions. (*Dickison v. Dickison*, 138 Ill. 541).

Inasmuch, therefore, as the testator in the ninth clause only gave to his wife his homestead farm and not all of his estate, the tenth clause is equally susceptible of the construction that he intended only to give to his daughter, Mary, such part of his estate as he had not already disposed of in the ninth clause and the other clauses preceding it. It is true that the daughter was only to have at the death of her mother such portion of the estate as the testator had not disposed of, and it may be uncertain where the title of the estate undisposed of was between the time of the testator's death and the death of his wife. The will leaves it a matter of question, whether, if there was any such undisposed of estate, it descended as intestate estate, subject to the use thereof by the widow during her life, or was otherwise disposed of. But this question does not arise here. The question, raised by the demurrer to the bill, simply involves the title to the

property described in the bill, which, as we understand its allegations and the arguments of counsel, is the same as the homestead farm mentioned in the ninth clause.

It is clear, that, as to the homestead farm, the testator devised the fee thereof to his wife, and there is nothing, in view of what has been said, in the tenth clause, which, by construction, reduces the fee, so granted, to a life estate. We are, therefore, of the opinion that the circuit court decided correctly in holding that Charlotte Saeger was the owner of the premises in question at the time of her death, and that the title thereto descended to her three children.

Accordingly, the decree of the circuit court is affirmed.  
*Decree affirmed.*

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THE VILLAGE OF RIDGWAY *et al.*

v.

THE COUNTY OF GALLATIN *et al.*

*Opinion filed October 19, 1899.*

1. STATUTES—*repeals by implication are not favored.* Statutes will be so construed as to avoid the repeal by implication of one act by a subsequent enactment, if such repeal can be avoided by any reasonable hypothesis.

2. SAME—*when subsequent general law does not repeal prior special law.* A subsequent general law does not repeal a prior special law, and if the later statute does not contain negative words it will not repeal the particular provisions of the special law on the same subject, unless it is impossible that both should be enforced.

3. ELECTION—*county seat election may be held under the act of 1872.* An election to determine whether a county seat shall be removed is properly conducted in compliance with the provisions of the special act for the removal of county seats, in force July 1, 1872, (Rev. Stat. 1874, p. 315,) and need not be held under section 16 of the Ballot law of 1891, (Laws of 1891, p. 113,) as the latter act does not repeal the former.

APPEAL from the Circuit Court of Gallatin county; the Hon. P. A. PEARCE, Judge, presiding.

181	521
87a	204
181	521
92a	1591
181	521
f189	1622
f189	•622
181	521
192	•380
181	521
202	1496
181	521
e215	•259

E. B. GREEN, THEODORE G. RISLEY, GEORGE W. PILLOW, and W. S. PHILLIPS, for appellants:

A proposition to remove a county seat is a proposition to vote upon a "public measure" by the people, within the meaning of section 16 of the act of June 22, 1891, and must be voted upon in the manner prescribed by that act. 2 Starr & Cur. Stat. sec. 16, p. 1686.

Since the passage of the act of 1891 a vote upon any public measure must be had in pursuance of section 16 of that act. The ballots must designate the measure to be voted on, and must contain the words "Yes" or "No," and the elector must designate his vote by a cross made opposite the word "Yes" or "No," as he may see fit to vote. *County of Union v. Ussery*, 147 Ill. 204.

Section 119 of the act on elections provides: "The judgment of the court, in cases of contested election, shall confirm or annul the election according to the right of the matter." Rev. Stat. 1874, p. 466.

The power conferred by section 119, *supra*, to "confirm or annul the election," is sufficiently broad and comprehensive to authorize a court of chancery to determine the legality of the election and to declare it illegal and void.

C. S. CONGER, GEORGE B. PARSONS, D. M. KINSALL, and CARL ROEDEL, for appellees:

The act of 1872, entitled "An act to provide for the removal of county seats," (1 Starr & Cur. Stat. p. 1117,) is special in its character, and is intended to operate upon a particular subject—elections for the removal of county seats—and no other; but the act of 1891 is a general law upon the subject of elections. The principle is therefore applicable that a subsequent statute which is general does not, by implication, repeal a former statute which is particular, though inconsistent with it. *Butz v. Kerr*, 123 Ill. 659; *Trausch v. County of Cook*, 147 id. 534; *Ottawa v. County of LaSalle*, 12 id. 339; *Rankin v. Cowden*, 66 Ill. App. 137.

The repealing clause of the Ballot law of 1891, which is, "all acts and parts of acts inconsistent with the provisions of this act are hereby repealed," does not necessarily affect or modify the act of 1872. The two acts are not inconsistent. The one applies only to an election on a particular question, and the other is made by its very terms to apply only to elections for public officers, (2 Starr & Cur. Stat. sec. 1, p. 1681,) and is not contrary to the Removal act.

Section 1 restricts the use of an Australian ballot to elections "for public officers," and this restriction is industriously guarded in the subsequent sections of the act. Where a statute specifies the things to be affected by its provisions there is an implied exclusion of others. *Gaddis v. Richland County*, 92 Ill. 124; *Sammis v. Clark*, 18 id. 544; *Sutherland on Stat. Const.* sec. 327.

The repugnance or inconsistency between the two acts is only apparent and not real, and is not irreconcilable; and if the two statutes are capable of being so construed that both may stand it is the duty of the courts to do so. *Holton v. Daly*, 106 Ill. 131; *Munson v. Crawford*, 65 id. 185; *Bruce v. Schuyler*, 4 Gilm. 221; *Harding v. Railroad Co.* 65 Ill. 90; *People v. Brayton*, 94 id. 341.

The general expressions of one section of an act will be restrained or limited by the particular provisions of others, where the manifest intent of the legislature requires it. *Biggs v. Clapp*, 74 Ill. 388; *Potter's Dwarris on Stat.* 188; *Gillinwater v. Railroad Co.* 13 Ill. 4.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

On November 15, 1898, an election was held in the county of Gallatin to determine whether the county seat should be removed from the city of Shawneetown to the village of Ridgway, and resulted in a majority of two hundred and twenty-one votes against such removal. The village of Ridgway and certain residents of the county,

who were electors and tax-payers therein, filed the bill in this case praying that the election might be declared illegal and void. The bill did not charge any fraud or illegal voting, and the only ground upon which complainants asked to have the election set aside was, that it was held and conducted in compliance with the provisions of the special act for the removal of county seats, in force July 1, 1872, and not in accordance with what is commonly known as the Ballot law, providing for the printing and distribution of ballots at public expense. The county of Gallatin and others were made defendants and demurred to the bill, and the parties stipulated that the case should be submitted to the court upon the bill and the demurrer filed thereto, and should be decided upon the following points: "First, should the election have been held under the provisions of the law commonly called the Ballot law, being 'An act to provide for the printing and distribution of ballots at public expense, and for the nomination of candidates for public offices, to regulate the manner of holding elections, and to enforce the secrecy of the ballot,' approved June 22, 1891, in force July 1, 1891; second, would a bill in equity lie at time of filing the bill, based solely upon a failure to comply with said Ballot law." The court sustained the demurrer and the complainants elected to stand by their bill, whereupon it was dismissed at their cost, and this appeal followed.

The act of 1872 is special in its nature for the purpose of regulating a particular class of elections—for the removal of county seats. The people, in framing the constitution, considered that subject of sufficient importance to make special provisions in relation to it and to provide different qualifications for electors from those required at other elections. Section 4 of article 10 of the constitution provides that no county seat shall be removed except in accordance with a vote in favor of its removal in such manner as shall be provided by general law; that no person shall vote on such question who has not resided in

the county six months and the election precinct ninety days next preceding the election, and that the question shall not be submitted to the people oftener than once in ten years. The legislature, being required to provide by a general law for elections of this character, passed the act of 1872, providing a complete system for holding such elections. The act requires that they shall be held on the second Tuesday after the first Monday of November, at the usual place of holding elections, and provides for the petition and contest of the same, the hearing by the county court, the appointment of resident legal voters of the points contesting for the location, as challengers, the form of the ballot, the hours of the election, the qualifications of voters, the form of oath for the voter and his witnesses, the canvass of the returns, the contest of the election, and all details connected with the subject. The Ballot law passed in 1891 does not contain any express repeal of the special act of 1872. There is no direct reference to it, or anything which would constitute such express repeal. The act of 1891 contains the provision that "all acts and parts of acts inconsistent with this act are hereby repealed," but that adds nothing to the legal effect of its passage. Without that provision any previous act inconsistent with it would be repealed, and such a repeal constitutes an implied repeal or repeal by implication. A repeal of the act of 1872 can only result on account of such inconsistency between the two acts that they cannot both stand. Such a repeal is not favored in the law, and a later statute will never be held to repeal an earlier one, unless they cannot be reconciled. It is the duty of the courts to construe them so as to avoid repeal, if such a construction can be given, and a statute will never be held to be repealed by implication if it can be avoided by any reasonable hypothesis. (*Town of Ottawa v. County of LaSalle*, 12 Ill. 339; *Tyson v. Postlethwaite*, 13 id. 727; *People v. Brayton*, 94 id. 341; *Hunt v. Chicago Horse and Dummy Railway Co.* 121 id. 638; *Butz v. Kerr*, 123 id. 659.)

It is also the rule that a subsequent law which is general does not abrogate or repeal a former one which is special and intended to operate upon a particular subject, and that if the later statute does not contain negative words it will not repeal the particular provisions of the special law on the same subject, unless it is impossible that both should be enforced. (*Covington v. City of East St. Louis*, 78 Ill. 548; *Gunnarssohn v. City of Sterling*, 92 id. 569; *City of East St. Louis v. Maxwell*, 99 id. 439; *Village of Hyde Park v. Cemetery Ass.* 119 id. 141; *Trausch v. County of Cook*, 147 id. 534.) Now, the act of 1891 does contain negative words as to the use of other ballots than those therein provided for in the case of elections for public officers, but has no negative words applying to any other class of elections. Section 1 of that act prohibits the use of any other ballots at any election for public officers, except for trustees of schools, school directors, members of boards of education and officers of road districts in counties not under township organization, but the act contains no negative word or word of prohibition as to the use of other ballots at an election where public officers are not voted for, like this election, where they are not and cannot be voted for.

Again, the Ballot law of 1891 specifies in said first section the kind of elections at which the ballots therein provided for shall be used. Those are the ones just named, where public officers are voted for. Elaborate provisions are made for the nomination of candidates for public offices, and for certificates of nomination, withdrawals, vacancies and objections, and for the printing and distribution of the ballots. The second section, providing for the expense of printing and delivering ballots, defines the term "general election," as used in the act, as applying to any election held for the choice of a national, State, judicial, district or county officer. Section 15 provides for the printing of the ballots, as follows: "For all elections to which this act applies, the county

clerks, in their respective counties, shall have charge of the printing of the ballots for all general elections, and shall furnish them to the judges of election. The city, town or village clerk shall have charge thereof and furnish them in all city elections, and the town clerk in counties under township organization shall have charge thereof and furnish the same in all town elections to which this act applies." The election to remove a county seat is, of course, neither a city election nor a town election, and it is not a general election under this act, because not within the definition contained in section 1. In *People v. Cowden*, 160 Ill. 557, we held that the absence of a provision in the act of 1891 for providing ballots for an election to establish a high school showed that it was the legislative intention that the act should not apply to such an election. We said (p. 560): "No provision, here or elsewhere in the act, is made for printing and distributing ballots for school elections, and it is therefore clear that the legislature, by providing, as we have seen, for the printing and distributing of ballots 'for all elections to which this act applies,' manifested an intention that the act should not apply to school elections." The ballots, under the act of 1891, cannot be printed, furnished or distributed for an election to remove a county seat on account of the lack of any provision in the law, and what was said in the above case has equal force here.

The fourteenth section of the act fixes the place where the question shall be printed upon the ballot in case a constitutional amendment or other public measure is submitted to a vote, and provides that such place shall be after the list of candidates for offices. The constitution does not authorize the submission of a constitutional amendment except at an election of members of a General Assembly, and the legislature doubtless had in mind the submission of such amendments and other public measures at elections where there were candidates for offices. The reliance of complainants is on section 16

alone, but when read in connection with the other sections, it will be seen that it was intended to give a form for stating the proposed measure, and the space on the margin and the designation of the place for marking, by the words "yes" or "no." The act had already provided, by section 14, where the question should be printed, and that section gave the form for putting the list of candidates on the ballot. Section 16 was apparently designed to furnish the same guide for the constitutional amendment or other public measure.

The legislature, in providing by special law for this particular sort of an election, by the act of 1872 directed the county court to appoint three legal resident voters of each locality contending for the location to act as challengers and to sit with the regular judges at the opposite competing point, and made careful provisions to enable these challengers to be away from their precincts during the whole time of the election and yet to preserve their right to vote. The act applied to a special subject attended with great difficulties and strong temptations, exciting whole communities to fraudulent practices, and there was special reason for the protection of voters by these challengers representing the contesting localities. In the act of 1891 there is no substitution for this most important right and protection, and the legislature certainly did not intend to destroy it where they have not expressly repealed the act or used any negative words showing an intention that it should not continue to be in force.

In *County of Union v. Ussery*, 147 Ill. 204, the court included the removal of county seats with other elections in illustrating what constituted a public measure, but there was no question in that case whether such an election should be conducted under the Ballot law, and questions now involved in this case were not decided by it. In that case the question of stock running at large was submitted at the general election in November, 1891, when

public officers were voted for, and the election was one of those governed by the Ballot law.

Having determined that the election was properly held and conducted under the law of 1872, it is unnecessary to notice the second question submitted by the stipulation.

The decree is affirmed.

*Decree affirmed.*

JOHAN JOSEPH REUTER

*v.*

JOHN STUCKART *et al.*

*Opinion filed October 19, 1899.*

181	529
197	161
181	529
198	72
181	529
208	896

1. EVIDENCE—*deeds over thirty years old at time of trial are "ancient documents."* Deeds more than thirty years old at the date of the trial are "ancient," although less than thirty years old at the date of the commencement of the suit.

2. SAME—*when deed is admissible as "ancient" without proof of its execution.* An instrument is admissible in evidence as an ancient deed, without proof of its execution, when it comes from the custody of the grantee's wife, who held possession under it for a series of years and paid the taxes assessed on the property in the grantee's name, and bears an indorsement showing the recording of the deed at a time more than thirty years before the trial.

3. SAME—*power of attorney in fact who executed ancient deed presumed valid.* The existence of a valid power of attorney will be presumed in favor of an ancient deed which purports to be executed by an attorney in fact. (*Fell v. Young*, 63 Ill. 106, distinguished.)

4. ADVERSE POSSESSION—*widow's possession under statutory rights is not adverse to heirs.* Possession of a dwelling house and land by a widow under her statutory right is not adverse to the heirs.

5. HUSBAND AND WIFE—*husband acquires no interest in wife's land from mere fact of working thereon.* In view of section 8 of the act on husband and wife, (Rev. Stat. 1874, p. 576,) declaring that neither a husband nor wife is entitled to receive compensation for services rendered in the management of the other's property, a husband acquires no interest in the land of his wife from the fact that he has performed labor upon it.

APPEAL from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

The original bill in this case was filed by the appellant, Johan Joseph Reuter, on October 21, 1897; and, a demurrer thereto having been sustained, an amended bill was filed on December 20, 1897, by the appellant against John Stuckart, Susan Foreman, Frank Stuckart, Joseph Stuckart and Henry Stuckart, praying for a setting off and assignment to the complainant in the bill of dower and homestead in the premises therein named, and for a partition of said premises according to the respective rights of all the parties, and for an injunction against the defendants, restraining them from prosecuting a forcible entry and detainer suit theretofore brought against the complainant, and from interfering with his possession of the premises, and for other and further relief.

To part of the amended bill the defendants below filed a plea, and an answer to the residue of the bill. The court held the plea and answer to be sufficient in form, and leave was given to the defendants to file a cross-bill. Thereupon Henry Stuckart and his wife, Tillie Stuckart, and Susan Foreman and her husband, Christian Foreman, filed a cross-bill against the said Johan Joseph Reuter, John Stuckart and Susan Stuckart, his wife, Frank Stuckart and Emma Stuckart, his wife, and Joseph Stuckart and Maggie Stuckart, his wife, praying in said cross-bill for a partition of the premises. Johan Joseph Reuter filed a separate answer to said cross-bill; and all the other defendants, except Johan Joseph Reuter, filed their joint and several answers. Replications were filed to the answers. The cause having come on for hearing, the court rendered a decree in favor of complainants in the cross-bill, and dismissed the amended bill of appellant. The present appeal is prosecuted from the decree so entered.

The amended bill alleges, that Johan Joseph Reuter, a resident of Chicago, married Anna Maria Stuckart on September 24, 1878, and lived with her, as her husband, from that time to the date of her death, on the premises described in the bill, to-wit, lots 35 and 36 in block 4 in

Brown's addition to Chicago; that, at the time of said marriage, Anna Maria Stuckart was in possession of said real estate, and had been in possession thereof at least two years prior to said marriage, and remained in possession thereof up to February 3, 1897, when she died; that she was in the open, continuous and adverse possession of said premises, as the owner thereof, for more than twenty years prior to her death; and that appellant was informed by said Anna Maria Stuckart, when he married her, that she was the sole owner of said premises, and believed that she was such owner when he married her, and thereafter up to the time of her death. The bill then alleges the making of certain improvements upon the premises, to the making of which the complainant contributed money and labor. The bill further alleges that the complainant and his wife lived upon said lots continuously as husband and wife, from the marriage up to her death, and occupied the same as a residence and homestead, and that complainant has continued to occupy the same since his wife's death continuously as a homestead up to the present time, and that since his marriage complainant has paid the taxes upon the property and insurance upon the buildings thereon. The bill further alleges, that Anna Maria Reuter left her surviving at her death her husband, the complainant, Johan Joseph Reuter, and five children, to-wit, her daughter Susan Foreman, wife of Christian Foreman, and her four sons, John Stuckart, married to Susan Stuckart, Henry Stuckart, married to Tillie Stuckart, Frank Stuckart and Joseph Stuckart, the said five children being her only heirs. The bill alleges further, that said five children above named claim some interest in the premises as heirs and next of kin of Nicholas Stuckart, and that Nicholas Stuckart at the time of his death, which occurred about September, 1876, was the husband of the said Anna Maria Stuckart, who subsequently became the wife of complainant; that the records of Cook county, showing the title to the above

premises prior to October 6 and 7, 1871, were destroyed by fire at that time; that appellant has no means of ascertaining in whose name the title to said premises stood at the time of his marriage; that none of the alleged heirs of said Nicholas Stuckart have made claim to any part of said premises from the time of the death of Nicholas Stuckart up to the time of the death of Anna Maria Reuter; that they are estopped from claiming any interest in said premises through neglect; that in April, 1897, said defendants or some of them commenced a forcible entry and detainer suit against complainant to recover possession of said premises and obtained judgment therein, from which appellant appealed to the circuit court of Cook county where said appeal is still pending; that the said John Stuckart for the rest of the heirs has commenced other forcible detainer suits for the possession of the said premises against appellant; that appellant is seventy-six years of age and feeble in health; that said heirs have taken possession of a portion of said premises, and collected rents, and ordered the tenants not to pay complainant their rents, and have ordered complainant to remove from said premises; and that said sons and daughter of said Anna Maria Reuter have refused to set off to appellant his homestead and dower.

The plea and answer of the defendants set up that from 1868 to December 29, 1874, Nicholas Stuckart, *alias* Stockhardt, was the owner of said premises; that at his death he left the widow and children already named, as his only heirs-at-law; that Nicholas Stuckart died intestate; that his title to said premises was derived from a special warranty deed dated April 4, 1868, executed to him by Isaac Buchanan and Agnes Buchanan, his wife; that the widow of Nicholas Stuckart died on February 3, 1897, and that defendants, who are the appellees herein, are now the sole owners in fee of said premises; that Anna Maria Reuter had no other interest therein except her homestead and dower right.

The answer denies that appellant ever paid any money towards building any improvements on the premises, or ever paid any taxes or special assessments on the same. The answer avers that the taxes were paid by Anna Maria Reuter. The answer admits that some work was done by the appellant on improvements constructed on the premises; that he was not able to perform much work, and all the money and nearly all the labor expended on said improvements were furnished by the defendants; that appellant knew that the title to the premises was vested in the defendants subject to the widow's dower and homestead; that, when she died, appellant took possession of all her money and personal property, the money amounting to \$799.50. The answer denies that Anna Maria Reuter had any estate of inheritance in the property, or that she and appellant have had possession of the same adversely to the defendants. The answer alleges that defendants were for many years infants, and lived with their mother and step-father harmoniously.

The cross-bill, after setting up the same allegations as those of the answer to the amended bill as above set forth, alleges that Nicholas Stuckart, the father of cross-complainants and of other parties who are defendants thereto, died on December 29, 1874, owning the premises in question, and leaving his widow and heirs as above stated. The cross-bill then states that the said children of Nicholas Stuckart became seized in fee of said premises as his heirs, and owned, each of them, an undivided one-fifth part thereof, subject to the dower of their mother, Anna Maria Stuckart; that such dower was never set apart to the widow, but it was understood between her and her children that she should be allowed a permanent home and the use and occupation of a portion of the premises, and the income thereof, during the remainder of her life, upon condition that she pay all the taxes and assessments thereon, and make all necessary improvements, and keep the premises in good repair; that Anna Maria

Stuckart, afterwards Reuter, with her children, or certain of them, occupied said premises during her lifetime; that she received all the rents, issues and profits arising therefrom, or from her portion thereof, and retained the same to her own use as long as she lived; that said heirs contributed their money, work and labor towards paying the taxes, and improving the premises, and keeping the same in repair; that said complainant has no interest therein. The cross-bill then prays for a partition as above stated.

The answer of the appellant to the cross-bill denies that Nicholas Stuckart was the owner of said premises in his lifetime or at his death, or that, by his death, the parties above named as his children and heirs became the owners in fee as tenants in common by descent from him of said premises. The answer to the cross-bill denies, that said heirs own each an undivided one-fifth of said premises, and denies that any such agreement between the widow and heirs, as is set up in the cross-bill, was made, and denies that the cross-complainants are entitled to a partition.

The decree finds that Nicholas Stuckart was the owner in fee of said premises at the time of his death; that he died intestate on December 29, 1874, leaving his widow and children above named as his only heirs-at-law; that said widow, subsequently married to appellant, died on February 3, 1897; that the allegations in the cross-bill are true, and that partition ought to be made as therein prayed; that said children above named of said Nicholas Stuckart are each entitled to one-fifth of said premises. The decree then directs that a division and partition of said premises be made, and that commissioners be appointed for that purpose.

ARND & ARND, (FRANKLIN B. HUSSEY, of counsel,) for appellant:

Possession, open, visible, actual and continuous, for twenty years or more, and with claim of title against the

world, constitutes absolute title. *Bauer v. Gottmanhausen*, 65 Ill. 499; *Turney v. Chamberlain*, 15 id. 271; *Carmody v. Railroad Co.* 111 id. 69; *Schoonmaker v. Doolittle*, 118 id. 605; *Lavalle v. Stroble*, 89 id. 370.

A husband, upon the death of his wife, is by law entitled to dower in all her real estate, (Hurd's Stat. 1897, chap. 41, sec. 1,) and also to homestead in such part as is occupied by him as a residence. *Ibid.* chap. 52, sec. 1.

Deeds more than thirty years old, executed by an attorney in fact, require proof of authority of attorney to execute before they are admissible in evidence. *Tolman v. Emerson*, 4 Pick. 160; *Fell v. Young*, 63 Ill. 106; 2 Phillips on Evidence, 396, note.

An ancient deed, to be admissible in evidence, must be accompanied by proof of enjoyment or possession, or by other satisfactory proof of its genuineness. Greenleaf on Evidence, (15th ed.) 209, note 1; *Bucklen v. Hasterlik*, 51 Ill. App. 141; 155 Ill. 423; *Smith v. Rankin*, 20 id. 14.

Facts and circumstances establishing the age of an ancient document as thirty years or more are necessary to its admissibility in evidence. It is not enough that the instrument purports to be ancient. 2 Am. & Eng. Ency. of Law, (2d ed.) p. 330, sec. d, and cases cited.

A deed thirty years old is no evidence that the grantor had title to the property mentioned in the deed. Unless the grantor has title, a deed from him only passes semblance or color of title. *Brooks v. Bruyn*, 35 Ill. 393.

J. J. HUBBARD, (SAMUEL CLARK, of counsel,) for appellees:

Adverse possession must be actual, visible, exclusive, open and notorious, and retained under claim of title inconsistent with that of the true owner. *Turney v. Chamberlain*, 15 Ill. 271; *Riggs v. Cook*, 4 Gilm. 336; *McLain v. Kellogg*, 17 Ill. 498; *Jackson v. Berner*, 48 id. 203; *Ambrose v. Raley*, 58 id. 271; *Downing v. Mayes*, 153 id. 334; *Gosselin v. Smith*, 154 id. 74; *Railway Co. v. Galt*, 133 id. 671.

An ancient deed, from proper custody, is admissible in evidence without proof of authenticity. 1 Am. & Eng. Ency. of Law, (1st ed.) 565; 1 Greenleaf on Evidence, (14th ed.) 192.

The existence of a valid power of attorney will be presumed in favor of an ancient deed purported to be executed by an attorney. *Storey v. Flanagan*, 57 Tex. 649; *Doe v. Phelps*, 9 Johns. 169; *Doe v. Campbell*, 10 id. 475; 1 Am. & Eng. Ency. of Law, (1st ed.) 556; *Johnson v. Timons*, 50 Tex. 521.

A husband cannot recover for services rendered to his wife. Starr & Cur. Stat. chap. 68, par. 8.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The appellant in this case claims dower and homestead in the premises in controversy as the husband of the deceased Anna Maria Reuter, upon the alleged ground that she was the owner of said premises when she died on February 3, 1897, by reason of having been in possession thereof for more than twenty years preceding her death. Appellant does not deny, that the appellees, who are the children of his deceased wife, are the owners of the premises in question, but he claims that they own the premises as heirs of their deceased mother, subject to his alleged right of homestead and dower therein; and his contention is, that his deceased wife acquired the ownership by reason of an adverse and undisputed possession of the premises for more than twenty years. On the contrary, the appellees claim that they are the owners of the premises as heirs of their deceased father, Nicholas Stuckart, or Stockhardt; that, their father having been the owner in fee of the premises when he died, their mother had no other interest therein than her right of homestead and dower; that her possession after the death of their father was not, and could not be, adverse to them, and that, at her death, she having had nothing more than

a mere life estate, the appellant, her second husband, had no interest whatever in the premises, either of dower or homestead or otherwise. (*Hertz v. Buchmann*, 177 Ill. 553).

In order to show title in their deceased father, Nicholas Stuckart, the appellees introduced in evidence an original deed, dated April 4, 1868, executed by Isaac Buchanan and Agnes, his wife, of Hamilton, Canada, as party of the first part, to Nicholas Stockhardt of Chicago, as party of the second part, conveying said lots 35 and 36. This deed upon its face named Isaac Buchanan and his wife as the grantors, but the deed was signed by Isaac Buchanan by Robert Reid, his attorney in fact, and by Agnes Buchanan by Robert Reid, her attorney in fact. The deed was acknowledged on the day of its date before a notary public in Chicago, who certified that Robert Reid was personally known to him as the real person, whose name was subscribed to the deed as having executed the same as the attorney in fact for Isaac Buchanan and Agnes his wife, and that said Reid, as such attorney, appeared before him in person, and acknowledged that he, as such attorney in fact, signed, sealed and delivered said deed as the free and voluntary act of said Isaac Buchanan and Agnes Buchanan, and for the uses and purposes therein set forth. Upon the back of the deed is endorsed a certificate of William L. Church, recorder of Cook county, Illinois, that the deed was recorded in his office on April 4, 1868, in book 439 of deeds at page 543.

When this deed was introduced in evidence upon the trial of the cause, it was more than thirty years old, and must, therefore, be regarded as an ancient deed. It is true that, when the original bill in this case was filed on October 21, 1897, the deed was not thirty years old, but the rule is that documents more than thirty years old at the date of the trial are "ancient," although less than thirty years old at the date of the commencement of the suit. (*Gardner v. Granniss*, 57 Ga. 539; *Bass v. Sevier*, 58 Tex. 567; 1 Am. & Eng. Ency. of Law, p. 565, note 1). In

*Applegate v. Lexington*, 117 U. S. 255, the Supreme Court of the United States say: "The rule is that an ancient deed may be admitted in evidence, without direct proof of its execution, if it appears to be of the age of at least thirty years, when it is found in proper custody, and either possession under it is shown, or some other corroborative evidence of its authenticity, freeing it from all just grounds of suspicion."

In *Whitman v. Heneberry*, 73 Ill. 109, we held that deeds more than thirty years old are ancient deeds, and may be admitted in evidence without proof of execution, but that, before they can be so admitted, it must appear that the instrument comes from such custody as to show a reasonable presumption of its genuineness, and that facts and circumstances must be proven, which will establish the fact that the instrument has been in existence the length of time indicated by its date. Some of the authorities differ as to whether it is necessary to show that possession was taken under the deed. It seems to be settled, however, by the weight of authority, that such possession, if necessary to be shown, need not be for the full period of thirty years, but may be for a less period if there are other circumstances tending to show the genuineness of the instrument. In *Whitman v. Heneberry*, *supra*, it was said, that endorsements or memoranda upon the deed, when they are of such character as to satisfy a cautious and discriminating mind that they would not be there if the paper were a forgery, have been considered as circumstances indicating that the deed is genuine. It was there said that, if the deed has been on record for over thirty years, that circumstance is a strong fact in favor of its genuineness. Greenleaf in his work on Evidence says, that an ancient deed, that is to say, one more than thirty years old, is presumed to be genuine without express proof of its execution, if it is found in the proper custody, and is free from just grounds of suspicion, and is corroborated by evidence of ancient or modern corre-

sponding enjoyment, or by other equivalent or explanatory proof. In such case, the witnesses to the deed are presumed to be dead, and the deed is presumed to have constituted a part of the actual transfer of the property mentioned in it. (1 Greenleaf on Evidence,—15th ed.—secs. 21, 144).

In the case at bar, the deed introduced was found in the drawer of an old bureau of his wife in a house upon the lots in question by the appellant himself, and taken therefrom and delivered to John Stuckart, one of the appellees and a son of the deceased, Nicholas Stuckart, after the death of Anna Maria Reuter, appellant's wife. Appellant himself says, that the deed had been in the place where it was found, and in the custody of his deceased wife, for more than twenty years, or from the time of their marriage up to the day of her death. Anna Maria Reuter, who had been the wife of Nicholas Stuckart, was married to the appellant on September 24, 1878, and had been in possession of these premises at least two years before said marriage. Counsel for appellant say in their brief, that she had lived on the premises in question for some years prior to her former husband's death. She was in possession of the premises, therefore, under the deed in question for more than twenty-nine years before her death. The endorsement on the back of the deed shows, that it was recorded on April 4, 1868, more than twenty-nine years before her death, and more than thirty years before the trial of the present suit in the court below. (*Quinn v. Eagleston*, 108 Ill. 248).

In addition to this, the evidence shows that, for some sixteen or seventeen years beginning with the year 1880 or 1881, Anna Maria Reuter paid the taxes upon these premises, and took the receipts in the name of her deceased husband, Nicholas Stockhardt. She refused to take the receipts in any other name than in the name of her deceased husband, the grantee in the deed already mentioned, and at one time the appellant quarreled with

her, because she insisted upon taking out the receipts in the name of her deceased husband. It thus appears that the deed came from the proper custody; that possession was held under it for a long series of years; that it had upon the back of it an endorsement, showing its record at a time more than thirty years before its production upon the trial; and that the ownership of the grantee in the deed was recognized in the mode in which the taxes were paid. The conclusion from all these various circumstances is irresistible, that the deed was genuine, and that its execution was established by its production without any further proof. The doctrine, that no proof of the execution of an ancient deed is required, is based upon a former requirement, that one or more witnesses should attest the execution of the deed. But, under the statute which existed at the time when this deed was executed, the acknowledgment before a notary public was sufficient proof of its execution, and the attestation of one or more witnesses was not required. It is not contended that there was any defect in the acknowledgment of the present deed, except in the respect hereinafter stated.

The deed appears to have been executed by the grantors therein named by one Robert Reid as their attorney in fact. It is claimed by the appellant that, on this account, the deed should not have been admitted in evidence upon the alleged ground that even a deed more than thirty years old, which is executed by an attorney in fact, is not admissible in evidence without proof of the authority of the attorney to execute the deed. There seems to be some difference of opinion in the text writers, and in the decisions of the courts, as to whether the existence of a valid power of attorney will be presumed in favor of an ancient deed when such deed purports to be executed by an attorney.

The learned author of the chapter on Ancient Documents in the American and English Encyclopædia of Law (vol. 1, p. 566, note 1,) says: "The existence of a

valid power of attorney will be presumed in favor of an ancient deed, purporting to be executed by an attorney." In *Phillips on Evidence* (vol. 2, marg. p. 471, note 429,) it is said: "A power to execute a deed will, in many instances, be presumed. In most cases, where the deed would be evidence as an ancient deed, without proof of execution, the power, under which it purports to have been executed, will be presumed."

We have examined the cases referred to to sustain the statements made by the foregoing text writers, and find that they support the statements so made. In *Robinson v. Craig*, 1 Hill, (S. C. Law) 251, where a deed stated that it was executed under a power of attorney, and was received in evidence as an ancient deed without proof of its execution, it was held that the power need not be produced; and the court there say: "Antiquity and other circumstances dispense with the necessity of any proof by witnesses, of handwriting, when the deed purports to be executed by the grantor personally; and there seems to be no good reason why they should not have the same effect, when it purports to be executed by attorney. The proof of the power would be only one of the facts to make out a due execution."

In *Doe v. Phelps*, 9 Johns. 170, it was said: "An ancient deed, with possession corresponding with it, proves itself; and a power of attorney contained in such deed, and necessary to give it validity, or full effect, will equally be embraced by the presumption." In *Doe v. Campbell*, 10 Johns. 475, it was said: "The power of attorney under which the title of some of the patentees was conveyed to VanDam, after so great a lapse of time, and such a universal acquiescence in the VanDam title, was to be deemed valid without proof of its execution." (See also *Johnson v. Timmons*, 50 Tex. 521; *Storey v. Flanagan*, 57 id. 649; *Innman v. Jackson*, 4 Greenl. 237; *Tolman v. Emerson*, 4 Pick. 160). It has been held that, after an undisputed possession for thirty years of any property, real or per-

sonal, it is too late to question the authority of the agent who has undertaken to convey it, unless his authority is by matter of record. (*Stockbridge v. West Stockbridge*, 14 Mass. 257; 1 Greenleaf on Evidence,—15th ed.—sec. 21).

Counsel refer to the case of *Fell v. Young*, 63 Ill. 106, as being opposed to the view above announced. In that case an ancient deed was produced, which was made by an administrator, and failed to show upon its face that the court, which ordered the sale, had jurisdiction over the parties to be affected by it. The rule there announced is correct, as the power there apparent upon the face of the deed was a public and statutory, and not a private, power. Such cases as that of *Fell v. Young* involve the question of jurisdiction of the tribunal ordering the deed to be made, and, in such cases, the power should be shown. But, in a case like the one at bar, the proof of the power is only one of the facts to make out a due execution of the deed, and the due execution of the deed is presumed in the case of an ancient deed in view of the great length of time which has elapsed, and in view of the possession taken, and other acts done under the deed.

We are of the opinion, that the court below committed no error in admitting the deed without proof of the execution of a power of attorney authorizing the attorney in fact to execute it. It was not necessary to prove title back of Nicholas Stuckart, because his title was the common source of title under whom all the parties claimed.

The proof shows quite conclusively, that the widow of Nicholas Stuckart, afterwards the wife of the appellant, was in possession of the premises under and in subordination to the title of her deceased husband, Nicholas Stuckart. An adverse possession for twenty years, which is sufficient to defeat the legal title, must be hostile in its inception, as well as continuous for the whole period of twenty years. (*Ambrose v. Raley*, 58 Ill. 506; *Downing v. Mayes*, 153 id. 330). It cannot be said that the possession of Mrs. Reuter was hostile in its inception to the title

of her children. Her possession was merely a continuation of the possession of her deceased husband, Nicholas Stuckart, and her conduct while she was in possession shows, that she recognized her tenure as being derived from her deceased husband, Nicholas Stuckart.

Under the statute as it existed when Anna Maria Stuckart, afterwards Reuter, went into possession, her right of possession was defeasible upon the assignment of her dower. In her case, however, dower was never assigned, and her possession continued by consent of the heirs for the term of her natural life. We have held, that the possession by the widow, under her statutory right, of the dwelling house and land is not adverse to the title of the heirs, but is entirely consistent and in harmony with such title. (*Riggs v. Girard*, 183 Ill. 619, and cases cited; *Gosselin v. Smith*, 154 id. 74). It follows that, in this case, Mrs. Reuter acquired no title by an adverse possession of twenty years.

Our conclusion is, that the appellees acquired title to the property as heirs of their deceased father, Nicholas Stuckart, subject to right of homestead and dower in their mother, and that, when their mother died, appellant had no interest in the property. As to the fact that appellant may have performed some labor for his wife upon the improvements located upon the premises, it may be said that he did not thereby acquire any interest therein. A husband in this State is not entitled to receive any compensation for labor performed or services rendered in the management of his wife's property. (Rev. Stat. chap. 68, sec. 8).

Accordingly, the decree of the superior court of Cook county, dismissing the amended bill, and granting the relief prayed by the cross-bill, was correct; and the said decree is affirmed.

*Decree affirmed.*

## WILLIAM HOLLOWAY

*v.*

THE PEOPLE OF THE STATE OF ILLINOIS.

*Opinion filed October 19, 1899.*

1. CRIMINAL LAW—when cross-examination is not error as tending to establish reputation of accused after the crime. On a trial for murder, when witnesses introduced by the defendant to testify to his general reputation for peaceableness are asked, on cross-examination, whether they knew anything about his reputation for five or six years before the trial, their answer that they did not is not prejudicial, as tending to establish a reputation after the homicide, which occurred four years before the trial.

2. SAME—when cross-examination of accused as to his past life is not error. The court may permit an accused person, after testifying in his own behalf, to be cross-examined as to matters already in evidence respecting his previous association with a disreputable woman.

3. SAME—when exclusion of testimony of witness at coroner's inquest is proper. The testimony of a witness given at the coroner's inquest is properly excluded, when offered by the defense at a murder trial, where no foundation was laid therefor and the witness was allowed to answer whether he testified to a certain thing at the inquest, which answer is not contradicted by the People, who did not introduce any of the testimony given before the coroner.

4. SAME—instructions for People in a murder trial may be framed on theory that the killing was murder. Instructions for the People, consisting mainly of statements in the language of the statute and correct as propositions of law, are properly given in a murder trial though framed on the theory that the killing was murder, where the evidence tends to establish such theory, and the jury are fully informed, in other instructions, upon the question of manslaughter.

5. SAME—instruction that accused must "satisfactorily" rebut People's case is ground for reversal. An instruction that when the killing is proved the burden of proof is cast upon the defendant to "satisfactorily" establish his defense, imposes a higher degree of proof than is required by law and is prejudicial error.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. EDMUND W. BURKE, Judge, presiding.

OSSIAN CAMERON, for plaintiff in error.

E. C. AKIN, Attorney General, CHARLES S. DENEEN, and HAYNIE R. PEARSON, for the People.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

On October 4, 1892, Benjamin F. Holmes lived in the second story of a house at 68 Polk street, in the city of Chicago, with a woman and her two children, which she had before she met him. Holmes and the woman lived in the assumed relation of husband and wife but had not been married. In the rear of the room occupied by them was the room of Grace Burns. Late that night plaintiff in error, William Halloway, who had been with a drum corps parading the streets and beating a drum for a political party, came to this house in search of Kittie Walker, a woman of the town, with whom he had been keeping company. She was in Grace Burns' room, but Halloway was told that she was not there. Afterward, during that night, at about one o'clock A. M., Halloway returned and came up the stairs still searching for the woman. Holmes had returned shortly before that time from his work, which was that of a cook in a restaurant, and he forbade Halloway coming up-stairs, and told him that he did not want him making a disturbance, and the vilest language was used by both the men. The woman, Kittie Walker, came out of the room where she was and Halloway went down the stairs. Holmes, in company with Ida Pope, a young girl, one of the daughters of the woman with whom he lived as his wife, followed down stairs to the sidewalk, where the defendant was standing. The woman, Kittie Walker, also went down the stairs. Holmes held in his hand a stick which had a hole in it, with a string through it which went around his wrist. About the time that he reached the sidewalk Halloway shot him and he died on the way to the hospital. Halloway fled, but returned to Chicago in September, 1896, where he was apprehended in company with Kittie

Walker, and was tried at the November term, 1896, of the criminal court of Cook county upon an indictment charging him with the murder of Holmes. He was found guilty of murder and sentenced to the penitentiary for the term of twenty-five years.

The defendant examined several witnesses as to his general reputation for peaceableness prior to the homicide, and complaint is made that the court permitted the State's attorney to cross-examine these witnesses as to such general reputation covering a period subsequent to the offense. The homicide occurred four years before the trial, and the questions objected to were whether the witnesses knew anything about his reputation for five or six years before the trial. The answers elicited were, that they did not; that they had lost trace of him five or six years before, and that they did not know what his general reputation had been during that period. This cross-examination showed that for a year or two before the homicide they knew nothing about him or his reputation. It did not tend to establish a reputation, either after the homicide or arising out of it, but merely developed the fact that the witnesses who said his reputation was good knew nothing about it at the time of the killing or some time before, and it was entirely proper.

The next complaint is, that the defendant, on his cross-examination as a witness, was compelled to testify to matters which had no bearing on the issue but could only disgrace and prejudice him. Being a witness, the defendant was subject to the same test as might be applied to any other witness. The cross-examination complained of merely related to his relation with the woman, Kittie Walker. It already appeared that he associated with disreputable characters and that his course of life was bad, and his relations with her were already in evidence. No harm resulted to him from the ruling.

The defendant also alleges as error that the court refused to permit him to introduce in evidence the testimony

of George Pope before the coroner's jury, at the inquest. Pope was asked, on his cross-examination, if he did not testify to a certain thing at the coroner's inquest, and he answered the question. He was not contradicted, and the People did not introduce the testimony given at the inquest, or any part of it. He had his say about it, and there was no foundation laid for introducing it, and it was properly excluded.

The first seven of the instructions given at the request of the People are said to be objectionable because they are given on the theory that the plaintiff was guilty of murder, and the form of verdict offered by the People is objected to on the same ground. These instructions were correct propositions of law and mainly statements in the language of the statutes. The evidence for the prosecution tended to establish that the killing was murder, and the People had a right to have the instructions given on that theory. The court, at the request of defendant, told the jury that they might find him guilty of manslaughter, and a form of verdict was given to be used in such case. Everything that the jury might rightfully do was explained by the instructions, and forms of verdict were given so that there is no ground for the complaint.

The eighth and ninth instructions for the People are claimed to assume the existence of material facts, but they are not subject to the objection and refer the jury to the evidence.

The verdict depended upon the credit which the jury should give to the witnesses. Those examined by the People testified to facts which clearly established the guilt of defendant, but there were witnesses in his behalf that he acted in self-defense, and he was entitled to have such evidence considered by the jury under proper rules. There was no controversy as to the killing, but the claim of the defendant was that it was justifiable, in the necessary defense of his person. The defendant had a right to have the evidence favorable to him go to the jury,

with proper instructions as to the quantum of evidence necessary to make out his defense. On that subject the court gave the eleventh instruction requested by the People, as follows:

"The court instructs the jury, as a matter of law, that if the jury shall find, from the evidence, beyond a reasonable doubt, that the killing of Benjamin F. Holmes has been proved as charged, then any defense which the defendant may rely upon in justification or excuse of the act, or to reduce the killing to the degree of manslaughter, it is incumbent upon the defendant satisfactorily to establish such defense, unless the proof thereof arises out of the evidence produced against him."

The statute declares that when the killing is proved, the burden of proof is cast upon the defendant to prove circumstances of mitigation or that justify or excuse the homicide, unless such proof arises out of the evidence for the People, but he is not required, when he assumes the burden of proof, "satisfactorily to establish such defense." The burden is on the People to prove the guilt of the defendant, and this instruction has been before the court repeatedly, and has uniformly been held to impose upon the defendant, when he assumes the burden of proof, a higher degree of proof than is required by the law. (*Alexander v. People*, 96 Ill. 96; *Smith v. People*, 142 id. 117; *Appleton v. People*, 171 id. 473.) The instruction having been repeatedly held to be erroneous and prejudicial error which requires a reversal, the assignment of error in giving it must be sustained.

Objections are made to other instructions given, but we find no error in them.

The judgment is reversed and the cause remanded to the criminal court of Cook county.

*Reversed and remanded.*

## THE KEWANEE BOILER COMPANY

v.

ANDREW G. ERICKSON.

Opinion filed October 19, 1899.

181	549
109a	189
181	549
211	517

1. **MASTER AND SERVANT**—servant may rely on master's statements as to safety of place to work. An employee directed to enter a boiler to make repairs at a specified time has a right to rely on the employer's statement that everything would then be ready, and to presume the conditions were safe, unless something occurred to put him on inquiry to the contrary.

2. **SAME**—master should impart his knowledge of danger to the servant. The failure of a master, upon learning of the fact, to give notice to a servant whom he had directed to enter one of a series of connected boilers at a certain time for the purpose of making repairs under assurance of safety, that there was steam in the other boilers, is such negligence as authorizes a recovery by the servant for injuries sustained thereby.

*Kewanee Boiler Co. v. Erickson*, 78 Ill. App. 35, affirmed.

**APPEAL** from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Henry county; the Hon. W. H. GEST, Judge, presiding.

This was an action on the case brought by appellee, against appellant, to recover damages for personal injuries sustained by him while in the employ of appellant as a boiler-maker.

Appellant was a corporation engaged in the business of making and repairing steam boilers at Kewanee, and the accident which caused appellee's injury happened in consequence of steam coming into the No. 4 boiler of the Western Tube Company (another corporation) through the blow-off pipe or "mid-leg." The Western Tube Company had in operation at its plant in Kewanee a battery of four large steam boilers for the generation of steam to supply the motive power for its said plant. These were large boilers set horizontally in brick masonry, side by side and close to each other, with upright brick walls

between them, the four boilers and masonry forming one compact structure. At the rear of this battery of boilers was a main blow-off pipe extending the whole length of the battery, and connected therewith were separate blow-off pipes to each boiler, with valves and cocks so arranged that each boiler might be used separately or in connection with its fellows, and the steam shut out of any one boiler while being used in the others, as the necessities or convenience of the business might require. The boilers were numbered consecutively, 1, 2, 3 and 4, No. 4 being the most southerly of the lot. When the entire battery of boilers was in action the valves in the blow-off pipes (or "mid-legs," as they were sometimes called by the witnesses,) are all left shut, but whenever, for the purpose of cleaning, washing out or repairing any one of the boilers, it was desired to separate it from the others in the battery, leaving them in action, it could be done by closing a valve leading from the generator or heater above into the dome, which would cut off the live steam and prevent it from entering the boiler, thus entirely isolating the boiler thus cut off; but if the valve in one of the mid-legs of the "live" boilers were opened and at the same time the valve in the mid-leg of the isolated boiler were left open, then, if the pressure were sufficient, there would be a rush of steam from the live boilers through the common or general blow-off pipe of the battery into such isolated boiler. Perhaps this is a sufficient statement as to the situation of the boilers, and their connection, to a fair understanding of the manner in which appellee's injury occurred.

It having been discovered that boiler No. 4 of the battery described required to be repaired by a patch in the bottom of the shell, Norval D. Bailey, the tube company's superintendent in charge of the plant, applied to appellant to make such repairs. An arrangement was made with the witness Horton Vail, appellant's vice-president and superintendent, to make such repairs, and it was

agreed that the tube company should have the boiler in question (No. 4) blown off and cooled down by four o'clock of Saturday afternoon, March 14, 1896, so that appellant's men could go to work thereon at that time, but the hour was subsequently changed to nine o'clock of the same evening, when it was arranged that appellant should send its men to remove the tubes or flues from the boiler, which was necessary to be done before the repairs could be made. It was not necessary that men should enter the boiler to remove the flues. It was further arranged that on Sunday morning appellant should send other men to patch the boiler and re-set the flues. The tube company was also to send men to "scale" the boilers,—that is, to remove with hammers the lime or "scale" accumulated on the interior thereof by the evaporation of water used therein. This work required that the men engaged in it should enter and work in the boiler. In arranging for the repair of the boiler, Vail told Bailey that he would not allow appellant's men in the boiler with steam on in any of the other boilers, and Bailey said that would be all right and that steam would be shut off Sunday morning. With this understanding Vail directed appellee and other of the boiler-makers to go to this boiler No. 4 on Sunday morning to assist in making the repairs, at the same time telling appellee that everything would be ready by that time. In accordance with this direction, appellee and two other servants of appellant, viz., Lindberg and Larson, went to this boiler on Sunday morning, entered it and commenced work on the repairs. The boiler was cold and there does not appear to have been any indication of danger to the men while there employed or anything to cause them to make inquiry in that regard, but while they were thus engaged in their work, and without any warning whatever, a sudden rush of steam and hot water came into the boiler, and before appellee could make his exit therefrom he was so badly scalded as to be seriously and permanently injured.

The negligence charged in the declaration was, that appellant failed to use reasonable care to provide a safe place for appellee in which to do the work required of him. The defense relied upon was that appellee knew of the danger, or by the use of ordinary care might have known of the danger and avoided it.

The cause was tried by a jury, resulting in appellee's favor for \$2500, upon which the court entered judgment after overruling motion for a new trial, and the defendant appealed to the Appellate Court, where the judgment was affirmed.

HENRY CURTIS, AMERICUS B. MELVILLE, and BLISH & LAWSON, for appellant.

N. F. ANDERSON, (C. C. WILSON, of counsel,) for appellee.

Per CURIAM: In deciding this case the Appellate Court delivered the following opinion:

"The law is well settled that it is the duty of the master to use reasonable care to furnish his servants a reasonably safe place in which to perform his work. That is a positive obligation resting upon the master, and he is liable for the negligent performance of that duty, whether he undertakes its performance personally or through another servant. (*Chicago and Alton Railroad Co. v. Scanlan*, 170 Ill. 106.) It is also the law, that if the servant knew of the danger, if any exist, or by the exercise of reasonable care might know of and avoid it, but voluntarily assumes the risk, he cannot recover for any injury sustained, even though the master may have been negligent in his duty to the servant.

"This is too familiar a proposition to need any citations of authorities in its support, but we fail to see that it has any application in the case at bar. There is no proof that appellee knew there was any steam in the boilers adjoining that in which he was working, and no

reason appears why he should have looked for or examined to see if there was danger. The boiler he entered was cold, and other men were working in it when he arrived there. He had a right to rely on the assurance of Vail that everything would be ready for him at seven o'clock Sunday morning,—the time he was directed to go to work. According to the testimony of Vail, Bailey had promised to have the steam down in all the boilers at that time, and had refused to let his men enter into No. 4 until the steam was out of the whole battery, no doubt because he knew it would be dangerous for them to do so. From the testimony of Bailey it appears that he informed Vail on Saturday afternoon that steam would be required for the annealing furnace some time on Sunday morning, the precise time, however, not being stated. At any rate, Vail was on the ground on Sunday morning for some fifteen minutes before the injury to appellee, and discovered that there was steam in the boilers. He talked with Stanton, the fireman or engineer, about it, and gave no notice to appellee, although he must have known it was dangerous, because he had declared his men should not enter the boiler to make repairs until the steam was out of all the boilers. We think such negligence was such as authorized a recovery. Vail had no right to tell appellee everything would be ready for him unless such were the fact and all reasonable precautions had been taken to secure his safety. Appellee had a right to rely on this statement of Vail and to presume the conditions were safe, unless something occurred to put him on inquiry as to the contrary, and nothing of the kind appears in the evidence. On the other hand, even though Vail may have supposed, when he gave the directions to appellee to go to work as stated, that all proper precautions had been taken, still, when he discovered that steam was in the boilers and that thereby appellee was in danger, it was his duty to have given notice to appellee that he might avoid the danger. Not to do

so was such negligence as rendered appellant liable for the injury.

"We find no material error in the rulings of the court upon the evidence, nor in the giving, refusing or modifying instructions. The instructions asked by appellant and refused by the court ignored the duty of appellant to give notice of the danger when discovered by Vail. On the whole, we think the jury were fairly instructed as to the law of the case, and we see no sufficient reason for reversing the judgment. It will therefore be affirmed."

Concurring in the views expressed by the Appellate Court, and in the conclusion reached by it, we adopt the foregoing opinion as the opinion of this court. Accordingly, the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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CHARLES BOGARDUS

v.

HORACE W. MOSES.

*Opinion filed October 19, 1899.*

181 554  
96a 208  
97a 581  


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181 554  
108a 270

1. RECEIVERS—when receiver for rents and profits should be discharged. A receiver of rents and profits of mortgaged premises, appointed pending foreclosure, should be discharged after sale of the premises for the full amount of the debt, interest and costs, and the possession of the property should be restored to the owner of the equity.

2. SAME—when mortgagor cannot have receivership continued as against his grantees. That a mortgagor who had transferred the property agreed to pay the mortgagee the over-due interest and costs, in consideration of which the mortgagee bid the full amount of the debt, interest and costs on foreclosure sale, does not entitle the mortgagor, as against the owner of the equity of redemption, to the continuation of a receivership to enable the mortgagor to collect, out of rents and profits, the amount he had so agreed to pay.

3. SAME—receivership should not be continued to enable receiver to pay future taxes. A receiver of the rents and profits of mortgaged premises will not be retained in office after their sale simply to pay a tax, which the owner of the equity of redemption is not legally bound to pay until after the expiration of the time of redemption.

4. *SAME—when receiver's discharge without direction to pay costs is not error.* A receiver's discharge without a direction that he pay costs alleged to have been incurred in the matter of his appointment will not be deemed error when there is nothing in the record to show that the costs so incurred were not paid.

*Bogardus v. Moses*, 78 Ill. App. 223, affirmed.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Ford county; the Hon. JOHN H. MOFFETT, Judge, presiding.

This is a writ of error, sued out from this court to review a judgment of the Appellate Court, affirming an order of the circuit court, discharging a receiver, who had been appointed in a foreclosure proceeding.

The bill was filed on April 26, 1897, by Annie N. Carter to foreclose a mortgage, dated March 9, 1891, and executed by Charles Bogardus and Hannah W. Bogardus, his wife, upon a certain lot in Paxton, upon which there was a building, to secure a bond for \$8000.00, due March 15, 1897, and twelve interest notes of \$240.00 each, executed by the said Bogardus and wife to Henry E. Carter, who subsequently assigned the bond, notes, and mortgage to Annie N. Carter. Afterwards Charles and Hannah W. Bogardus conveyed the premises to Dunham & Fisher, subject to the lien of the mortgage. Dunham & Fisher afterwards executed a quit-claim of the premises to the defendant in error, Horace W. Moses. Bogardus and his wife, and Moses, and certain other persons, occupying the premises as tenants of Moses, were made defendants to the bill. The bill was answered by Moses and certain of the other defendants, who were occupants of the premises. On August 6, 1897, the complainant in the bill, Annie N. Carter, filed her petition asking for the appointment of a receiver, in which petition the plaintiff in error, Charles Bogardus and his wife, Hannah, subsequently asked leave to join. Moses answered the petition, and

opposed the appointment of a receiver. Pending the application for a receiver, and on August 20, 1897, the court rendered a foreclosure decree for \$8711.34, principal and interest, and in addition thereto \$103.50 for attorney's fees and costs. On August 26, 1897, after the decree of sale was entered, the court appointed one Harry B. Henderson as receiver. On October 18, 1897, the master sold the premises to the complainant, Annie N. Carter, for \$9055.92, the amount of the decree, interest and costs. On December 29, 1897, the master made his report of sale.

The decree of sale provided that, in default of the premises selling for the amount of the decree, execution should issue against Charles Bogardus, the plaintiff in error, and Hannah W. Bogardus for the deficiency. The mortgage conveyed the real estate described therein "together with all the rents, issues, and profits thereof;" the mortgagors therein agreed to pay all the taxes and assessments on the premises, and, in default of such payment, the mortgagee had the option to declare the amount of the debt due, and to foreclose the mortgage, and enter into possession of the premises, and receive all the rents, issues, and profits thereof. The mortgage also provided that, upon the maturity of the indebtedness thereby secured, a receiver might be appointed to take possession of the premises and collect the rents thereof.

On December 20, 1897, the plaintiff in error, Charles Bogardus, filed a petition in the case praying for an order upon the receiver to redeem from a tax sale of the premises for the taxes of 1896, which had theretofore taken place, and to pay certain other taxes for necessary repairs upon the premises. This petition set forth the provisions of the mortgage; that the premises had been sold at the master's sale; and that the plaintiff in error, Charles Bogardus, had made an agreement with the complainant, Annie N. Carter, by the terms of which plaintiff in error was to pay her \$1065.99, being the amount of the over-due interest on the mortgage and the costs, and to

remain liable for \$8000.00 of principal with interest according to the terms of the bond, unless the premises should be redeemed.

On January 4, 1898, the receiver filed his report, in which he showed that he had paid the insurance upon the premises; had redeemed them from tax sale; had paid a sidewalk tax, mentioned in the petition, from rents collected by him; and had a balance on hand of \$9.09. On the same date, January 4, 1898, the defendant in error, Moses, filed his answer to the petition of Bogardus, alleging that the property had been redeemed from tax sale, that the cost of constructing the sidewalk had been paid, that the property had been sold at the master's sale for the debt, interest, and costs, and that he would make the necessary repairs without delay; and denied the right of Bogardus to have the receiver pay the special paving tax or subsequent taxes on the property; and also denied the right of the petitioner to have the receiver continued, and asked that he be required to turn over the money on hand to Moses, and be discharged. Exceptions were filed to this answer, which were overruled; to which order, overruling his exceptions, Bogardus excepted, and prayed an appeal. The court, thereupon, entered an order, finding that the petitioner was not entitled to have the receiver pay the taxes for the year 1897, or the special pavement tax, and ordering that the petition be dismissed, and that the plaintiff in error, the petitioner here, pay \$2.00 of the costs on said petition, and the defendant Moses should pay the balance of the costs, and that the receiver should pay the balance in his hands to the defendant in error, Moses. On January 15, 1898, the court, upon the motion of the defendant in error, Moses, after refusing to grant the continuance of said motion upon the application of the plaintiff in error, Bogardus, supported by an affidavit, entered an order discharging the receiver upon his assignment of the insurance policies as directed in the decree. The plaintiff

in error took an appeal from the order discharging the receiver.

On February 12, 1898, the plaintiff in error presented his bill of exceptions to the court below, which sets forth the affidavit of E. C. Gray, attorney of Bogardus, for a continuance of the motion to discharge the receiver. The bill of exceptions recites that exception was taken to the action of the court in overruling the motion of continuance, and also that no oral evidence was offered by either party, but that the matter of the discharge of the receiver was considered upon the original petition of the receiver, and all the proceedings had after the sale.

WALTER WARDER, and GRAY & BEACH, for plaintiff in error.

CLOUD & KERR, for defendant in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The only question in this case is, whether the order discharging the receiver was properly entered by the court below. Although the application for the appointment of the receiver was made before the decree of sale was entered, his appointment was not actually made until after the decree of sale was entered. When the sale took place under the decree of foreclosure, the property was bid in by the complainant in the bill for the amount of the decree and interest and costs. Under the doctrine laid down in *Davis v. Dale*, 150 Ill. 239, it would seem to follow, that the receiver should have been discharged as a matter of course. In *Davis v. Dale, supra*, we held, that the grantor in a mortgage or deed of trust, or the owner of the equity of redemption, is entitled to the possession of the premises, and to receive the rents, issues and profits thereof after the sale and until the time of redemption expires; and we there said: "And it follows necessarily, that where the property is bid off at the foreclosure sale

for the full amount of the decree, interest, and costs, as was here done, the necessity for continuing the receiver ceases, and he should be discharged, and the possession restored to the owner of the equity of redemption." This is true, as well when the purchaser at the sale is the holder of the secured indebtedness, as when such purchaser is a stranger and outsider. In such case, when the lien of the mortgage has been enforced by the sale of the property, and such sale has realized the whole amount of the debt, interest, and costs which are due, the mortgage has expended its force, and the property is no longer subject to its provisions. (*Ogle v. Koerner*, 140 Ill. 170; *Seligman v. Laubheimer*, 58 id. 124; *Davis v. Dale*, *supra*).

Counsel for plaintiff in error seem to claim, that the receiver should have been continued, in order to raise money enough out of the rents collected by him to pay plaintiff in error what, according to the allegations in the petition filed by him on December 20, 1897, he agreed to pay to the complainant in the foreclosure proceeding. Plaintiff in error alleged in his petition, that the complainant would not have bid the full amount of the debt, interest and costs, if plaintiff in error had not agreed to pay the over-due interest and costs, amounting to \$1065.99, and interest on the principal of the encumbrance in case the premises should not be redeemed. It is argued that plaintiff in error became thereby subrogated to the rights of the mortgagee, and by reason thereof, was entitled to continue the receivership.

In the first place, no evidence whatever was introduced to prove that any such agreement, as is set up in the petition, was made. If it were true, however, that the plaintiff in error agreed to pay the complainant in the foreclosure proceeding a part of the amount due by the terms of the foreclosure decree, this would not have entitled him to a continuance of the receiver as against the defendant in error, Moses, who was owner of the equity

of redemption. Whatever part of the decree plaintiff in error may have paid to the complainant to induce her to bid the full amount of the decree, and thus prevent a judgment against himself for the deficiency, he would get back in case of the redemption of the premises from sale by defendant in error, Moses. In case the premises should not be redeemed, he would be entitled, under the agreement alleged, to an interest in the title acquired by purchase at the master's sale. Defendant in error, Moses, was not a party to the agreement in question, and whether the plaintiff in error was subrogated in whole, or in part, to the rights of the mortgagee, the rights of Moses, defendant in error, would remain the same. The right of subrogation, if it existed, could confer no greater rights upon the plaintiff in error than were possessed already by the mortgagee, who was the complainant in the decree; and the mortgagee, whether she owned the whole decree, or transferred a part of it to the plaintiff in error, would not be entitled to a continuance of the receiver after the sale of the property for the whole amount of the debt, interest and costs.

It may have been otherwise, if the property had not been sold for the whole amount of the debt, interest and costs, and if there had been a deficiency for which the plaintiff in error was personally liable. In *Haas v. Chicago Building Society*, 89 Ill. 498, it was held, that, under certain circumstances, a receiver to collect the rents and profits of mortgaged premises may be appointed after the final decree of foreclosure and sale. But, in that case, the premises were sold for less than the amount due by the terms of the decree of foreclosure, and there was a deficiency of more than \$9000.00; and we there said (p. 506): "If there had been no deficiency, those rents would have belonged to the owner of the equity of redemption. But the mortgagee had an equitable right to such rents to pay the deficiency, which right could only be enforced by an application to the court to appoint a receiver."

So, also, in *Oakford v. Robinson*, 48 Ill. App. 270, where, as here, the rents and profits of the land, as well as the land itself, were pledged by the mortgage for the security of the debt, and where a receiver was appointed after the entry of the decree of foreclosure, it appeared that the property was sold at the master's sale for less than the amount of the debt, interest and costs due under the decree, so that there was a deficiency; and it was there held, that, by the appointment of a receiver, an equitable lien was acquired on the rents and profits of the land during the statutory period allowed for redemption for the payment of the deficiency. (2 Jones on Mortgages,—5th ed.—sec. 1531 *a*). In the case at bar, however, there was no deficiency as the result of the sale, and consequently the doctrine of the case of *Davis v. Dale, supra*, is precisely applicable.

The plaintiff in error, in the petition filed by him on December 20, 1897, stated that a special tax had been levied by the city of Paxton upon the mortgaged premises for the purpose of paving a street in that city; and that this special tax was confirmed on August 5, 1897, and was for \$157.20 with interest at six per cent from that date, the "tax to be paid as follows: \$45.80 on or before two years; \$55.70 on or before three years; \$55.70 on or before four years." We do not find any testimony in the bill of exceptions, or in the record anywhere, establishing the existence of this tax. Counsel for plaintiff in error insist, that the receiver should have been retained until this special tax was paid off out of the rents of the property. We are not concerned with the question, whether or not this special tax, as set up in the petition, was payable in such installments as were required under existing statutes. No such question is here raised, and need not be determined. If, however, the tax was valid and payable in proper amounts and at proper times, the first installment was due on or before August 5, 1899. The time of redemption from the master's sale expired

on January 18, 1899. While it may be true that the defendant in error, Moses, the owner of the equity of redemption, would have been allowed to pay off the whole of the special tax in question at once, yet he was not legally bound to pay the same until long after the expiration of the period of redemption. It was not necessary to retain the receiver in office to pay a tax, which the owner of the equity of redemption was not legally bound to pay until after the expiration of the time of redemption. The object of appointing a receiver at the instance of a mortgagee is to preserve the security of the mortgage and apply the rents, when necessary, in the discharge of the indebtedness. The indebtedness, however, must be an existing indebtedness, which the mortgagor is liable to pay during the running of the period of redemption, and which he neglects to pay. "This right to have a receiver of the rents appointed pending the litigation depends upon the general principle of equity, that the purpose of such an appointment is to preserve the property, so that it may be appropriated to satisfying the decree of court." (2 Jones on Mortgages, sec. 1516). The special tax in question was not a part of the decree. Neither the complainant in the foreclosure suit, Annie N. Carter, nor the plaintiff in error, paid the tax, or caused it to be entered up as part of the decree. The complainant in the bill had the privilege of paying the tax after the sale was made, and then, under the act of 1889, the party entitled to redeem would have been obliged to pay to the holder of the certificate of sale the amount of the tax with interest at the rate of six per cent per annum, by proceeding as required by section 27a of the act in regard to judgments, etc. (Hurd's Stat. 1897, p. 981). Payment of the tax, however, was not made by the complainant after the sale. If such payment had been made, it could have been recovered back in case of redemption, but, in case no redemption took place, the payment would have inured to the benefit of the purchaser. The ques-

tion, however, is not whether the receiver should have been retained to raise money to pay the tax if the mortgagor had been bound to pay it during the running of the time of redemption. Inasmuch as the tax was not necessarily due during that time, we are of the opinion that the court was not obliged to continue the receivership.

It is, also, claimed by plaintiff in error that the court erred in not directing the receiver to pay out \$9.65 on account of court costs incurred in the matter of the appointment of the receiver. Of course, the general rule is that the costs of the appointment of a receiver are entitled to priority of payment out of the funds realized by him. (High on Receivers,—3d ed.—sec. 809). But there is nothing in this record to show that all the costs, which were incurred in the matter of the appointment of the receiver, were not paid. A fee bill has been fastened into the record in this case, but is, in fact, no part of the record. If, however, it can be regarded as being a part of the record, it purports on its face to be a bill of fees incurred at the December term, 1897, and, so, evidently refers to costs incurred upon and under the petition filed by the plaintiff in error on December 20, 1897. The court ordered these costs to be paid, part thereof by plaintiff in error and part by defendant in error. No objection is made to this part of the court's order, nor is it claimed that either of the parties hereto is pecuniarily irresponsible. The receiver here is not complaining about his costs. Moreover, the question of these costs does not appear to have been raised in the circuit court, and the fee bill is not made a part of the record by the certificate of evidence. In the petition filed by plaintiff in error on December 20, 1897, praying for an order upon the receiver to make certain payments specifically named, the payment of the costs here referred to was not mentioned. We are unable to see that the court committed any error in discharging the receiver without requiring him to retain this amount in payment of his own costs.

None of the reasons, urged by the counsel for the plaintiff in error against the action of the court below in discharging the receiver, are sufficient, under the circumstances detailed in this record, to justify us in holding that the court below committed error. Accordingly, the order of the circuit court, discharging the receiver, is affirmed.

*Order affirmed.*

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CHARLES J. YOCKEY

*v.*

CHARLES P. SMITH.

181      564  
95a      182

*Opinion filed October 19, 1899.*

1. **WAREHOUSES**—*warehouseman has no property in stored grain that is subject to livery.* The proprietor of a warehouse in which grain is stored for a compensation has no property in the grain that can be levied upon under execution against him, as he is not the debtor of the owners of the grain, although it is intermingled in common bins, but is a custodian charged with the duty to restore, in quantity and quality, such grain as he may receive.

2. **SAME**—*title to grain merely stored in private warehouse does not pass to warehouseman.* The title to grain placed in a warehouse, whether public or private, does not pass to the proprietor of the warehouse, when he agrees to hold it for the owner and subject to his order.

3. **TROVER**—*trover may be maintained against officer for conversion of goods taken on execution.* One who is the owner of property and entitled to its possession may, after demand, maintain trover for its conversion against an officer who levied upon it under an execution against a third person.

*Yockey v. Smith*, 81 Ill. App. 556, affirmed.

**APPEAL** from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of LaSalle county; the Hon. H. M. TRIMBLE, Judge, presiding.

This was an action of replevin, brought by appellee, against appellant, to recover the possession of 4955 bushels of corn and 211 bushels of oats which had been stored

by appellee in the elevators of Robert T. Harrington, at Marseilles, Illinois, and which had been levied upon and seized by appellant, as sheriff, under an execution against Harrington.

The declaration contained counts in the *cepit* and *detinet*, and, the grain not having been found, there was a count in trover. Appellant pleaded *non cepit*, *non detinet*, not guilty and property in Robert T. Harrington, and also a special plea justifying the taking and detention by virtue of an execution against Robert T. Harrington in favor of the First National Bank of Marseilles, Illinois, and alleging the property of the grain to be in Harrington and not in plaintiff. Issues were joined on these pleas and a traverse of the special plea. The cause was tried by a jury, who returned a verdict finding appellant guilty and assessing appellee's damages at \$1241.06. The court overruled a motion for a new trial and entered judgment on the verdict, which, on appeal, was affirmed in the Appellate Court.

WIDMER & WIDMER, (HENRY MAYO, and BUTTERS, CARR & GLEIM, of counsel,) for appellant.

CHARLES S. CULLEN, for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

It appears from the testimony introduced on the trial that Harrington was a grain dealer at Marseilles. He bought, shipped and sold grain on his own account and received grain in store from farmers in his elevators. He operated two elevators, one known as the "Harrington" or "Railroad elevator" and the other as the "Schroeder elevator." Appellee, being the owner of about 3000 bushels of oats and 5000 bushels of corn, hauled and stored it in the elevators operated by Harrington, under an agreement, as the evidence tends to show and as the Appellate Court found, that it was to remain his grain,

subject to his own order, until such time as he saw fit to sell, but the agreement provided that appellee should pay one-quarter of a cent per bushel per month after the first day of November, if left until that time. The grain was delivered from time to time, commencing in June and ending September 29, 1897. In July 2700 bushels of the oats were sold to Harrington, but the balance of the grain remained in store. The execution upon which appellant seized the grain came into his hands on October 1, 1897, and was levied the next day. The property was sold and the proceeds applied in satisfaction of the execution and other executions which appellant had received against Harrington October 1 and 2, 1897.

Under the facts the question presented is whether the grain in question was the property of Harrington, and, as such, liable to be taken and sold under execution against him, or whether it was the property of appellee.

Section 1 of article 13 of the constitution declares: "All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses." The Appellate Court found as a fact that the grain in question was stored under a contract, under which appellee was to pay, as compensation for storage, a certain amount per bushel after November 1, 1897, and this finding, in connection with the evidence showing the time and manner in which Harrington had been engaged in the grain and warehouse business, establishes as a fact that the warehouses kept by Harrington were public warehouses, within the meaning of the constitution and the statute of July 1, 1871, (Hurd's Stat. 1897, chap. 114,) and that the grain of appellee was received by Harrington as a public warehouseman. If Harrington received the grain as a public warehouseman the title to the property did not pass to him but remained in appellee, and it could not be taken and sold for Harrington's debts. In *German Nat. Bank v. Meadowcroft*, 95 Ill. 124, where a simi-

lar question was involved, it was held that where grain is consigned to a public warehouse and is there stored in bins, mingled with other grain of like character and grade belonging to different persons, so that its identity is lost, upon the refusal of the warehouseman to deliver, upon the presentation of the proper warehouse receipts, the quantity of grain and of the grade called for by such receipts, the holder of the receipts may maintain trover for the recovery of damages. It was also held that if the warehouse and grain are transferred, the person to whom the transfer was made would in like manner be liable to the parties who had stored the grain. In *Snydacker v. Blatchley*, 177 Ill. 506, it was held that one engaged in buying and shipping grain, and also in storing grain for others in elevators situated in a city having less than 100,000 inhabitants, is the keeper of a public warehouse of class B, within the meaning of section 2 of the Warehouse act. (Rev. Stat. 1874, p. 820.) It was also held that receipts for grain delivered to a public warehouseman by the owners evidence a bailment, and not a sale, whether the grain is kept separate or not.

The rule adopted in the cases cited may properly be applied here. We think it is plain that the proprietors of public warehouses, such as were kept by Harrington, do not become debtors of the owners of the grain stored, but, on the other hand, they are custodians, charged with the duty to restore, in quantity and quality, such grain as they may receive. This rule is demanded for the safety and security of those who entrust their grain to the keeping of persons engaged in the public business of warehousemen.

It is, however, claimed in the argument that instructions 7, 8, 10 and 11 given for the plaintiff authorized recovery in behalf of the plaintiff on the supposition that Harrington was doing business as a private warehouseman. We do not so understand the instructions. No. 8 merely declares, in substance, that, if the jury believe,

from the evidence, that plaintiff was the owner of the property in question and entitled to the possession thereof at the time of the commencement of the suit, and that defendant was guilty of wrongfully detaining the same after demand, then the plaintiff was entitled to recover. No. 10, in substance, directed the jury that if they found, from the evidence, that the grain in question was the property of plaintiff and that he was entitled to the possession, and that the defendant levied upon and took possession under an execution against Harrington, and that he had sold the property without the consent of plaintiff, this would amount to a conversion and plaintiff would be entitled to recover. The eleventh declared, in substance, that although the jury might believe, from the evidence, that the sheriff lawfully came into the possession of the property, yet if they find that plaintiff was the owner and entitled to the possession, and before the commencement of the suit made a demand for the possession of the property and defendant refused to deliver the same but afterwards sold the property, this would amount to a conversion. As to the three instructions, we fail to see wherein they lay down an incorrect rule of law or one calculated to mislead the jury in arriving at a correct decision of the questions submitted for their determination.

As to the seventh instruction, the jury were, in substance, directed, that if they believed, from the evidence, that plaintiff delivered in the warehouses of Harrington certain grain described in the declaration, and that the grain was delivered under an agreement between plaintiff and Harrington that the grain was to be held by Harrington upon storage as in a public warehouse, or, if said warehouses were not public warehouses, then that the agreement was that the ownership of the said grain should remain in plaintiff and should be subject to his order and control until such time as he should see fit to sell, "and that at the time of the levy of the execution

by the defendant said Harrington had on hand in said warehouses said grain, or grain of like character and grade equal to or exceeding the amount of grain delivered by the plaintiff, which said Harrington was holding for said plaintiff under said agreement, and that said defendant levied upon and took said grain upon an execution in favor of the First National Bank of Marseilles and against said Harrington, and sold or otherwise disposed of the same so as to deprive the plaintiff of the same without the consent of the plaintiff, then the jury should find for the plaintiff."

While we do not regard this instruction as a model, we do not regard it liable to the objection urged against it. The first part of the instruction relates to public warehouses, and no fault is found with that portion of it; but that part of the instruction after the word "or," it is claimed, authorizes a recovery although the grain of the plaintiff was stored in private warehouses. This, as we think, is a misapprehension of the terms of the instruction. The instruction, as we understand it, predicates the right of recovery on the theory that there was a contract between the parties under which the grain was stored, and under which the ownership of the grain should remain in plaintiff and be subject to his order and control, and at the time of the levy Harrington had on hand plaintiff's grain which he was holding for the plaintiff. If grain was placed in the warehouse under a contract that it was to be held for the plaintiff, subject to his order and control, and it was so held, it could make no difference what kind of a warehouse it was in. As no title could pass under such an arrangement, a creditor of Harrington would have no right to seize and sell the property for Harrington's debts.

We find no substantial error in the record, and the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

WASHINGTON SANFORD *et al.**v.*

SARAH C. DAVIS.

*Opinion filed October 19, 1899.*

181 570  
187 1248

1. APPEALS AND ERRORS—*defense of Statute of Frauds cannot be first raised on appeal.* The Statute of Frauds cannot be relied on in the Supreme Court when not pleaded or urged upon the hearing.

2. SPECIFIC PERFORMANCE—*when specific performance of verbal contract to convey will be decreed.* Specific performance will be decreed of a verbal agreement by a father to convey land to a child if the latter will live upon and improve it, where, in reliance upon the promise, the child takes possession, pays the taxes and makes lasting and valuable improvements on the property.

3. EVIDENCE—*when evidence of previous gift of land by mortgagor is competent on foreclosure.* Testimony of a daughter that her father gave her certain land and a deed of it, which she returned to him on the representation that otherwise the property might be taken for the debts of her husband, is competent, as against the father, in a proceeding to foreclose a mortgage subsequently given by him on the land.

4. DEEDS—*title passes on delivery of deed though the deed is returned to grantor for an outside purpose.* Title passes upon delivery of a deed by a father to a daughter, although the latter returned it upon the representation that otherwise the land could be taken for the debts of her husband.

5. MORTGAGES—*when mortgage is subject to title of occupant of premises.* A mortgage executed by a father upon land previously given by him to his daughter, and upon which she resided, is subject to her title, where the mortgagee knew of her occupancy under claim of title, and the father, at the time of the gift, was not indebted.

WRIT OF ERROR to the Circuit Court of Cumberland county; the Hon. FRANK K. DUNN, Judge, presiding.

EVERHART & DECIUS, for plaintiffs in error.

LOGAN & GREATHOUSE, for defendant in error.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This was a writ of error brought by Washington Sanford and J. R. Harrison, executors of the estate of Moril Sanford, deceased, and David Baughman, to reverse a

decree of the circuit court of Cumberland county obtained by Sarah C. Davis against them, wherein a foreclosure proceeding instituted by said executors against David Baughman was vacated and a certificate of purchase set aside, and Baughman was decreed to convey the land involved in the proceeding, to-wit, the south-east quarter of section 7, township 9, range 11, in Cumberland county, to Sarah C. Davis.

The facts out of which this litigation arose are, briefly, as follows: In 1867 David Baughman owned 2300 acres of land. His daughter, the defendant in error, married James Davis. Soon after the marriage Baughman turned over to his daughter 240 acres of land. Eighty acres were in Clark county and in cultivation, and upon which were erected a log house, stable, smoke-house, and a well had been dug. The other tract consisted of 160 acres of unimproved prairie land in Cumberland county, enclosed by a fence with another quarter section of land lying south of it. Mrs. Davis, with her husband, moved on the 80-acre tract in Clark county, and she also took possession of the other tract of 160 acres in Cumberland county. They built a fence on the south line of the quarter, erected a house, barn and other out-buildings, set out an orchard, dug a well, and made other improvements at a cost of \$2500. In 1873 they moved on the quarter section, and they have resided on it ever since, and from year to year paid all the taxes assessed on the land, Mrs. Davis claiming the land as her own. Four or five years ago Baughman sold the 80-acre tract in Clark county, and that tract is not involved in this proceeding. On the 10th day of September, 1879, Baughman mortgaged the 160-acre tract in Cumberland county to Moril Sanford to secure the payment of \$1600. In 1894 this mortgage was taken up and Baughman gave a second mortgage to Sanford for \$5724. Shortly after this mortgage was given Sanford died. At the August term, 1897, of the Cumberland county circuit court Washington Sanford and J. R. Harrison, executors

of the estate of Moril Sanford, foreclosed the mortgage last above described, but Sarah C. Davis was not made a party. Under the decree of foreclosure the land was sold on the 15th day of October, 1897, and purchased by Sanford and Harrison, executors, and this bill was filed by Sarah C. Davis to set aside the foreclosure proceedings and the master's certificate of purchase as clouds on her title. Baughman was made a party to the bill, and the complainant prayed that he be required to convey the land to her by proper deed of conveyance. On the hearing on the pleadings and evidence the court entered a decree as prayed for in the bill.

The Statute of Frauds was not pleaded or in any manner relied upon on the hearing in the circuit court, and it cannot be relied upon here. The law is well settled in this State that where a father makes a verbal agreement with a child to convey to such child a tract of land if the latter will enter and live upon the land and improve it, and the child enters upon the land in reliance of the promise and makes lasting and valuable improvements, a court of equity will decree the specific performance of such a contract. *Irwin v. Dyke*, 114 Ill. 302, and cases cited.

It is fully and clearly established by the evidence that in 1867 David Baughman turned the land in controversy over to his daughter, Sarah C. Davis; that she and her husband entered upon it, improved it and have resided upon it since 1873; that they paid all taxes assessed on the land, and that Mrs. Davis has, from the time she entered upon it, claimed the land as her farm, and that it has been known and recognized by all persons in the neighborhood as the Davis farm. When the land was turned over to Mrs. Davis it was fenced in with another quarter section joining it on the south, but in other respects it was wild, unimproved prairie land. The Davis' ran a fence between the two quarters, broke the land and erected valuable improvements thereon, which were

worth from \$2000 to \$2500. Baughman, whose deposition was taken on behalf of the defendants, admitted in his evidence that he always intended that his daughter should have the land. He further admitted that he had made out deeds to his children for lands given to them, including Sarah C. Davis, but that the deeds were not delivered and were subsequently destroyed. The complainant testified, and her evidence was competent as against Baughman, that he gave her the land and that he handed her a deed for the same, but she returned the deed, as they made her believe it might be taken for the debts of her husband. If her evidence was true,—and it is not impeached,—the title passed by the deed although it was returned. Venson Swim, a witness who resides near the land, testified that Mrs. Davis has occupied the land since 1872, and that it was known as her farm. He further testified that over twenty years ago David Baughman in a conversation said that Mary, his daughter, took the south half of the half section and that he gave the north half of the half section (the quarter section in dispute) to Sarah C. Davis. Indeed, the evidence shows beyond question that Baughman gave the land to the complainant, and that in pursuance of the gift she went into the possession as early as 1872, and that she has occupied the premises as a home and residence ever since, making valuable improvements and claiming the land as her own. When Moril Sanford took a mortgage on the land from David Baughman the complainant was in possession claiming title, and her possession was notice to him of her rights and title in the property, and the mortgage was subject to her title. Moreover, when the mortgage was given, the mortgagee, Sanford, resided in the same neighborhood and knew that complainant was occupying the land claiming title. Knowing these facts he took subject to her title. When the gift was made Baughman was a large landholder and was not indebted, and, so far as appears, the gift to the complainant was a

reasonable provision, which, under all the circumstances, he had the right to make.

After a careful consideration of all the evidence we are satisfied the decree vacating the mortgage and the certificate of sale made by the master, and requiring David Baughman to execute a deed, was correct, and it will be affirmed.

*Decree affirmed.*

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THE PEOPLE *ex rel.* Frank A. Johnson *et al.*

*v.*

THEODORE H. SCHINTZ.

*Opinion filed October 19, 1899.*

ATTORNEYS AT LAW—an attorney guilty of larceny will be disbarred. The name of an attorney who is shown to have been guilty of larceny will be stricken from the rolls upon information filed by the Attorney General.

#### INFORMATION for disbarment.

E. C. AKIN, Attorney General, (FRANK ASBURY JOHNSON, of counsel,) for the relators.

Per CURIAM: This is an information by the Attorney General in the name of the People at the relation of five members of the bar of Cook county in this State, charging Theodore H. Schintz, the respondent herein, a practicing attorney in the city of Chicago, with fraudulent, dishonest, scandalous and unprofessional conduct, calculated to bring the courts of justice into disrepute and contempt and to tarnish the good name of the legal profession, and asking that an order be entered, striking his name from the roll of attorneys of this court, and debarring him from the right to practice law. Rule to show cause was entered. Answer was filed to the information. Commissioner was appointed to take testimony, which has been

taken and returned into court. It sustains the charges against the respondent. Under a stipulation between the parties, the evidence taken in *Schintz v. People*, 178 Ill. 320, has been introduced in this proceeding, and is a part of the record here. The facts are sufficiently stated in that case, and need not be repeated here. The proof shows that respondent has been guilty of larceny.

Let the rule be made absolute, and let an order be entered, striking the name of Theodore H. Schintz, the respondent herein, from the roll of attorneys of this court in accordance with the prayer of the information filed by the Attorney General.

*Rule made absolute.*

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THE NIAGARA FIRE INSURANCE COMPANY

v.

D. HEENAN & Co.

*Opinion filed October 19, 1899.*

181	575
95a	48
181	575
108a	545

1. INSURANCE—*law leans to that construction of policy which affords insured indemnity.* The law will lean to that construction of an insurance contract which carries out the purpose of such a contract and affords the insured indemnity.

2. SAME—*when insurance on building will include fixtures covered by other insurance.* A company which insures a building, only, is liable for the loss of fixtures built into it, although some of them are included in a separate item covered by other insurance, when the loss on the building exceeds the insurance upon it and that upon the item in which the fixtures are included.

3. PROPOSITIONS OF LAW—*party cannot complain of correct modification of his proposition of law which might have been refused.* A proposition of law not applicable to the facts or material to the issues may properly be refused, and the party requesting it cannot complain that the court held the same after correcting it.

4. SAME—*amount of damages awarded on fire policy not open to review by Supreme Court.* The amount of damages awarded in a suit on a fire insurance policy, when presented as a question of fact, is not reviewable by the Supreme Court.

*Niagara Fire Ins. Co. v. Heenan & Co.* 81 Ill. App. 678, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of LaSalle county; the Hon. CHARLES BLANCHARD, Judge, presiding.

PADEN & GRIDLEY, for appellant.

P. J. LUCEY, and BATES & HARDING, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

The Appellate Court affirmed a judgment entered in the circuit court of LaSalle county in favor of appellee, and against appellant, for \$3074.16, the full amount of a policy of insurance issued by appellant upon appellee's store building, with interest from the time when the payment was due. There is no controversy as to the insurance or the loss, and it is conceded that appellant is liable for its full *pro rata* share of such loss, excluding certain fixtures which would ordinarily be included as parts of the building. The controversy is whether these fixtures are to be excluded.

The case was tried without a jury, upon an agreed statement of facts. So far as material to be stated they are as follows: The plaintiff, D. Heenan & Co. was a corporation carrying on a department store which it owned in the city of Streator, and, together with two insurance agents, prepared printed slips describing its property, for the purpose of insuring it. The description on the slips was divided into three parts. The first item was as follows:

"\$..... on its three-story, brick, composition-roof building, and basement, additions, foundations and area walls; occupied principally as a general store, post-office and offices; situated on the north-west corner of Main and Park streets, Streator, Illinois."

The second item was its stock of merchandise, not material in this case. The third was as follows:

"\$..... on its store furniture and fixtures, consisting, in part, of awnings, counters, shelving, bins, butter boxes, refrigerators, desks, chairs, safes, wall paper racks, track ladders, scales, gas and water pipes, stoves and piping, steam boilers and pump, steam heating apparatus and connections, hydraulic engine and elevator, two Babcock fire extinguishers, coffee grinders, brick encased coffee roaster, small upright steam engine with appurtenances, soda fountain, with attachments and furnishings, one ventilating fan and electric motor and attachments, and such other furniture and fixtures as are necessary for conducting its business; all while contained in the above described building and basement, additions and areas under sidewalk adjoining said building."

Plaintiff obtained insurance with various companies to the extent of \$119,000, and one of these slips was attached to each policy. Each company insured one item contained in the slip, and inserted the amount which it insured in the blank space. No company insured more than one of the separate items. The defendant's policy was for \$3000 on the first item, and the figures "3000" were inserted in the blank space at the beginning. The similar spaces at the commencement of the other items were filled with a horizontal mark of the pen. The entire insurance on the first item amounted to \$35,000. Other companies insured on the second item to the extent of \$80,000, and still other companies insured to the amount of \$4000 on the third item. On November 22, 1897, the premises were destroyed by fire. The loss on the second item was \$120,000, and the companies insuring on that item paid the full amount of their policies,--\$80,000. The loss on the third item was \$13,000, which was \$9000 more than the insurance, and the companies insuring on that item alone paid their policies, amounting to \$4000. A disagreement arose between the parties as to the amount of loss and damage on the first item, and each party selected an appraiser, in pursuance of the policies, who

made an award in writing that the total loss and damage on the first item was \$32,250, but they disagreed as to whether the fixtures mentioned in the third item, which were a part of the building, should also be included in the loss and damage under the first item. Not being able to agree upon that question, they signed a further writing and delivered the same to the parties, as follows:

"STREATOR, ILLINOIS, February 24, 1898.

"We, the undersigned, chosen to estimate on the Heenan & Co. building, at Streator, Illinois, find that the loss on steam heating, elevator, plumbing, gas piping and fixtures amounts to the sum of \$5544, as follows:

Gas piping and fixtures.....	\$550
Heating .....	4000
Elevator.....	2000
Plumbing.....	380
Twenty per cent depreciation.....	—
Balance .....	<u>5030</u> <u>1846</u> <u>5544</u>

S. W. EGBERT,  
SAMUEL R. WHITE."

These fixtures embraced in this last paper were built and placed in the building in the usual way when it was erected, and served their purpose until the time of the fire. Plaintiff afterward sent additional proof of loss of other fixtures annexed to the building, which were omitted from the building by the appraisers without fraud, but it will not be necessary to notice them or any question raised about them, because we have concluded that the fixtures enumerated by the appraisers and valued by them in the above paper were a part of the building to be included as insured by the defendant. Under that construction of the policy the loss exceeds the total amount of insurance, and defendant is liable for the full amount of its policy.

The ground upon which it is claimed that the fixtures which were a part of the building and would ordinarily be included under the description of it in defendant's policy are to be excluded, is, that they are mentioned in the third item, together with the personal property and store

furniture, such as awnings, counters, desks, chairs, etc. The court held as law a written proposition submitted by the plaintiff, which represents its claim, as follows:

"The court holds, as a matter of law, that insurance on a three-story brick, composition-roof building, and basement, additions, foundations and area walls, covers everything which enters into said building and forms a part thereof, including plumbing, steam heating, elevators, gas piping, sewer pipes, etc., where these items are built into the building at the time it is erected and form a part thereof; and if a fire occurs, the insurer whose policy covers on the building is liable for loss to the above items, where it is shown that they are not covered by other insurance."

The defendant submitted a number of propositions asking to have the court hold, as a matter of law, that the parties might, between themselves, determine that the fixtures were personalty, and their agreement would be enforced; that the division of the subject of insurance into three separate items, and the issue of a policy by it, as insurer, upon the articles enumerated in one of the items alone, excludes the other items; that the enumeration of fixtures in the third item excludes them from the description of the building in the first, although the articles so enumerated, in the absence of designation as the subjects of a separate contract, would be deemed proper constituents of the building named in the first item, and that the specific enumeration of the fixtures as a separate matter of contract made the effect of the policy an insurance of the building without the fixtures. The court modified each of them so as to hold that articles enumerated in the third item which belonged to and formed a part of the first item were embraced and covered by it unless covered by other insurance, and that the policy which insured the building covered everything which constituted such building and formed a part thereof, which was not otherwise covered by insurance.

There is no doubt that parties may make contracts of insurance to suit themselves, and the question here is what contract did the parties make. Three subjects of insurance were presented to defendant, the first of which was plaintiff's building in its entirety, and defendant chose to insure, and did insure, the building as there described. The only ground for the argument that it did not insure the entire building according to the description in the first item is, that there was another item which included specific portions of it, upon which some other company might, and did, place insurance. A contract of insurance is a contract of indemnity, and unless indemnity for the loss sustained has been reached, the law will lean to that construction which carries out the purpose of such a contract and gives such indemnity. (*Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 106; *Commercial Ins. Co. v. Robinson*, 64 id. 265; *Niagara Fire Ins. Co. v. Scammon*, 100 id. 644.) Here, there were policies to the amount of \$35,000 on the building and other insurance to the amount of \$4000 on personal property, including a part of the building consisting of the fixtures built into it. The loss on the building was in excess of all the insurance, which was not equal to such loss whether the \$4000 of insurance on the third item is applied *pro rata* upon all the articles in that item or to the other articles exclusive of the fixtures. If the insurance on the third item had been sufficient to pay for the loss of the fixtures, the plaintiff could not recover again for that part of the building; but they formed a part of the building and were described in the first item, and their loss is not paid for by any other insurance. The fixtures were not excepted from the building in the general description of it as insured by defendant, and we do not think that it is a necessary or proper conclusion that the defendant did not intend to insure the whole building under its general designation, merely because the mixture of articles in the third item included portions of the building.

The defendant submitted a further proposition of law, that where parties put a certain valuation upon different subjects of insurance the effect is to make them distinct matters of contract, and the court modified this proposition in like manner with the others. The proposition was not applicable to the case, because, as between these parties, there was no separate valuation or separate insurance upon the building and the particular portions of the building mentioned in the third item. They put no separate valuation upon the building and fixtures, but the entire valuation was put upon the building as a whole. The proposition might have been refused, but the modification was not incorrect.

The defendant also asked the court to hold the proposition that an award of appraisers is final and binding upon the parties in the absence of fraud and misconduct, and the court modified it by inserting the word "mistake" after "misconduct." The proposition should have been refused because it could have no influence in deciding the issues. The agreed statement of facts shows that the appraisers disagreed as to whether the fixtures constituted a part of the building or not, or whether they were included under the first item. Their awards do not show that they found that \$32,250 covered the whole building, but that they disagreed as to whether it did or not. It is immaterial what alteration the court made in the proposition.

Counsel say that the judgment was excessive in amount, but we agree with the construction given to the contract by the circuit court, and as presented in this record the amount of damages is a question of fact not reviewable in this court.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

## THE IROQUOIS FURNACE COMPANY

v.

## THE WILKIN MANUFACTURING COMPANY.

Opinion filed October 19, 1899.

181	582
92a	525
181	582
96a	1077
96a	1879
97a	4269
181	582
196	1888
101a	378
181	582
106a <sup>1</sup>	864
106a <sup>1</sup>	866
181	582
212	1874
181	582
§115a <sup>1</sup>	804
j115a <sup>10</sup>	806

1. APPEALS AND ERRORS—*effect where case is tried on mistaken theory of law.* A judgment will be reversed and the case sent back for new trial where it was tried upon an erroneous or mistaken theory of law.

2. ATTACHMENT—*objections to form of affidavit should be made below.* An objection to an amendable defect in an attachment affidavit comes too late when first raised in the appellate tribunal.

3. SAME—*when statement of non-residence in affidavit is sufficient.* An affidavit for attachment on the ground of the non-residence of the defendant corporation is sufficient, where it alleges, in conformity with section 1 of the Attachment act, that the defendant is not a resident of the State, and further shows that its residence is in a certain city in a designated State, although it fails to aver that the defendant was chartered in the State of its alleged residence.

4. SAME—*when notice of publication in attachment is sufficient to confer jurisdiction.* In an attachment suit a notice of publication, whereby the defendant is required to appear at the next term of court, erroneously stated to be the third Monday of August instead of the third Monday of September, is sufficient to confer jurisdiction upon the court, although it requires the defendant's appearance prior to the commencement of the suit the date of which is stated in the notice, since the mistake is apparent, and the defendant is presumed to know when, under the law, the next term begins.

5. SAME—*when alleged defect in bond does not go to jurisdiction.* That an attachment bond, in a suit by a partnership, was signed by only one partner as principal does not go to the jurisdiction of the court, and cannot be urged on appeal by the garnishee in a collateral attack upon the judgment rendered in the attachment proceeding, when the objection was not raised in the court below.

6. GARNISHMENT—*extent to which garnishee may attack a judgment against attachment defendant.* A garnishee, against whom judgment has been rendered in an attachment suit, cannot complain of mere irregularities in the antecedent proceedings or the judgment against the attachment defendant, but may attack their validity on the ground that the court was without jurisdiction.

7. SALES—*warranty of quality and fitness by a manufacturer—effect.* A manufacturer who proposes, in accordance with specifications prepared by him, to furnish a purchaser blowing engines guaranteed to be of the best material and workmanship and to be equal or superior to any blowing engine on the market, undertakes that

they shall be equal, for the purpose and design for which a blowing engine is intended, to any other engine on the market, whether constructed according to the same specifications or not.

8. EVIDENCE—*evidence of breach of warranty is competent through the article has been received and used.* It is competent for a purchaser of engines, although he has received and used them, to show, by way of recoupment, that they were not constructed according to the contract or are unsuitable for the purpose intended.

9. CONSTRUCTION—*when recitals in agreement may be given force.* Recitals in an agreement may be given force when referred to in the operative part of the instrument in such a way as to show that they were designed to form a part of it.

10. DAMAGES—*term "penalty" prima facie excludes idea of stipulated damages.* The word "penalty" *prima facie* excludes the notion of stipulated damages, although the use of either the word "penalty" or the words "liquidated damages" is not conclusive.

11. SAME—*sum named as damages is a penalty if contract is uncertain.* A sum named in an agreement as damages for its breach will be construed as a penalty when the terms of the contract are indefinite and uncertain.

12. SAME—*when sum named in contract is a penalty and not liquidated damages.* In a contract where a sum of money is made payable in gross for a breach of any of its stipulations, which are of various degrees of importance, and as to some of which the damages might be considered liquidated whilst the damages for the non-performance of the others are not measurable by any exact pecuniary standard, such sum is a penalty only, and not liquidated damages.

13. SAME—*sum greatly exceeding actual damages is a penalty.* An amount agreed to be paid in case of delay in the delivery of machinery to be manufactured for a purchaser will be treated as a penalty where it greatly exceeds the actual damages suffered by the purchaser on account of the delay.

*Iroquois Furnace Co. v. Wilkin Manf. Co.* 77 Ill. App. 59, reversed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. FRANCIS ADAMS, Judge, presiding.

This is a proceeding by attachment, commenced on August 28, 1891, by Pickands, Brown & Co. against the Wilkin Manufacturing Company. The attachment writ, which was issued August 28, 1891, was made returnable September 21, 1891. The affidavit alleged that the ap-

peltee, the Wilkin Manufacturing Company, was indebted to the plaintiffs, Pickands, Brown & Co., in the sum of \$1085.32 for goods sold and delivered. The sheriff made return, that no property of the defendant was found in his county, and that he had served the writ on the appellant, the Iroquois Manufacturing Company, as garnishee.

The declaration contains the common counts only. The interrogatories to the garnishee required it to state, whether the defendant was furnishing material, or doing work in pursuance of any contract between the defendant and the garnishee. The garnishee, who is the appellant here, answered, stating that the appellee, the Wilkin Manufacturing Company, had furnished material in pursuance of the contract hereinafter described; that the appellant had paid \$12,750.00 of the purchase money for the engines named in the contract, and had off-sets and claims for damages against the balance; that the Wilkin company had assigned its claim to John Featherstone's Sons, of which the garnishee had notice; that William Bayley & Sons had filed a bill to enforce a sub-contractor's lien on account of material furnished for the engines; that other attachment suits had been sued out, and laid in the hands of the garnishee; and that one John Barth claimed the moneys, if any, due on account of said contract, by virtue of an assignment made to him by the Wilkin company. The answer of the appellant garnishee further stated, that the engines referred to in the contract were partially shipped from Milwaukee about the third days of July and August, 1891, respectively; and the final working parts came into the possession of the garnishee about September 13, 1891.

John Featherstone's Sons filed an interplea, and set up an assignment from the Wilkin Manufacturing Company to them dated June 9, 1891, covering the moneys due or to become due on account of said contract.

John Barth also filed an interplea, setting up a claim to all moneys from the appellant garnishee by virtue of

an assignment for the benefit of creditors, made by the Wilkin company to him, dated August 18, 1891.

The attaching plaintiffs filed an unsworn replication, traversing the answer of the garnishee. They also traversed the interpleas of John Featherstone's Sons and John Barth.

By agreement of the parties, a jury was waived, and the cause was tried before the court without a jury. The trial court found the issues in favor of the plaintiffs, and that, at the date of the service of the writ, the garnishee, the present appellant, was indebted to the appellee, the Wilkin Manufacturing Company, the defendant in the attachment proceeding, in the sum of \$12,250.00. The garnishee excepted to the finding of the court, and moved for a new trial. The exceptions and motion were overruled. Thereupon, the court rendered judgment, ordering that the appellee, the Wilkin Manufacturing Company, recover from the appellant, the Iroquois Furnace Company, the garnishee, the sum of \$12,250.00, \$1085.32 thereof for the use of the attaching plaintiffs, Pickands, Brown & Co.; \$6649.25 thereof for the use of John Featherstone's Sons; and \$4565.43 for the use of John Barth, assignee, and that the appellee should have execution therefor for said uses.

The garnishee, the Iroquois Furnace Company, took an appeal from the judgment, so entered, to the Appellate Court, where the judgment was affirmed. The present appeal is prosecuted from the judgment of affirmance, entered by the Appellate Court.

The contract between the appellee, the Wilkin Manufacturing Company, and the appellant, the Iroquois Furnace Company, consisted of certain letters and specifications, which were offered in evidence. The contract was embodied in a letter, written by the Wilkin Manufacturing Company to one Eagle, the president of the Furnace company, dated July 2, 1890, and a letter in reply thereto, dated July 5, 1890, written by said president, accepting the proposition contained in appellee's letter.

The letter of July 2, 1890, is as follows: "We propose to furnish you two blowing engines complete, as per specification enclosed, for twenty-eight thousand dollars (\$28,000.00) f. o. b. cars at South Chicago. We send a man to superintend the erection and start the engines; we to pay his time, you his traveling expenses and board. The first engine to be delivered six months from date of order, the second, one month after the first one. We guarantee all these to be of the best material and workmanship and to be equal or superior to any blowing engine on the market. Payments to be made as follows: Fifty per cent on shipment, the balance when the engines are in successful operation and fulfill our guaranty. For first deferred payment we will accept your ninety days' note. In consideration of the prompt acceptance of the proposition we will discount the above price two thousand five hundred dollars (\$2500.00), making the net amount twenty-five thousand five hundred dollars (\$25,500.00) for the two engines. Of this discount of two thousand five hundred dollars (\$2500.00), one-half to be deducted from the cash payment and one-half from the deferred payment. Specification was enclosed in ours of June 24."

The letter of July 5, 1890, is as follows: "We accept the proposition contained in your favor of July 2, and attach to it the specifications enclosed in yours of June 24. Please hurry the two engines, and we trust you will not be as long in building them as the proposition calls for."

The specifications accompany the letters, and are set out in full in the record.

The parties also made a supplemental contract, which is as follows:

"Whereas, the Wilkin Manufacturing Company of Milwaukee has agreed to manufacture and deliver to Iroquois Furnace Company at Chicago two certain engines, of the character, for the price and at the time stated in the written contract heretofore made between the parties; and whereas, it has been agreed that no damage will be

sustained by said purchaser if said engines are not delivered as soon as the times limited therefor by said contract, unless the delay beyond such times exceeds the time hereinafter mentioned; and whereas, said purchaser is desirous that said contract shall contain a penalty, in the nature of stipulated damages, to be paid by said Wilkin Manufacturing Company if said company shall fail to furnish the said engines at the time hereinafter provided:

"Now, therefore, in consideration of the mutual covenants herein made, said Iroquois Furnace Company does extend the time for delivery of said engines, and does agree that if the same shall be delivered as follows: the first on or before April 1, 1891, and the second on or before May 1, 1891, then such delivery shall be construed as full compliance with said contract, so far as the time of delivery is concerned. And said the Wilkin Manufacturing Company on its part agrees, in consideration of the said extension of time, that it will deliver the said engines at the expiration of said respective dates, and that it will pay to said Iroquois Furnace Company, as liquidated damages for any delay which shall ensue after said first of April, as to the first engine, and after the first of May as to the second engine, the sum of \$50.00 per day for all time which the delivery of said engines shall be delayed after May 1, 1891."

DEFREES, BRACE & RITTER, for appellant:

The supplemental record discloses that no attachment bond sufficient in law was filed in the cause, and in such case the attachment is declared by statute to be illegal and void. *Starr & Cur. Stat. chap. 11, sec. 4; Tedrick v. Wells*, 152 Ill. 214; *Carson v. Merle*, 3 Scam. 169; *Hileman v. Beale*, 115 Ill. 355.

The defects in the attachment proceedings above pointed out are jurisdictional, and may be taken advantage of by the garnishee on appeal from the judgment entered against it as such. *Pierce v. Carleton*, 12 Ill. 358;

*Thormeyer v. Sisson*, 83 id. 188; *Dennison v. Taylor*, 142 id. 45; *Haywood v. McCrory*, 33 id. 459; *Haywood v. Collins*, 60 id. 328; *Firebaugh v. Hall*, 63 id. 81; *Kirk v. Dearth Agency*, 171 id. 207.

The residence or non-residence of a corporation is a question of law and not a question of fact, and the facts should be set forth in the affidavit for attachment, from which the court can draw the conclusion of law which justifies the issuance of the writ, otherwise the affidavit is void. *Railroad Co. v. Keep*, 22 Ill. 9; *Wells v. Parrott*, 43 Ill. App. 656; *Merrick v. VanSantvoord*, 34 N. Y. 208; Am. & Eng. Ency. of Law, 330; *Railroad Co. v. Glenn*, 28 Md. 287; *Insurance Co. v. Francis*, 11 Wall. 210; *State Treasurer v. Auditor*, 46 Mich. 224; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Holbrook v. Ford*, 153 Ill. 633.

The court tried the case upon an erroneous theory of law respecting the construction, force and effect of the contract, and therefore the judgment should be reversed and the case sent back for a new trial. *Bright v. Kenefick*, 69 Ill. App. 43; *Kimball v. Doggett*, 62 id. 528.

A contract to manufacture a boiler which shall be as durable as any "now in use" is good and enforceable. *Insurance Co. v. Morgan*, 22 Ill. App. 198.

An agreement that a machine shall do as good work as any other machine "in the market" is valid and enforceable. *Aultman v. Weber*, 28 Ill. App. 92.

ARTHUR HUMPHREY, KNIGHT & BROWN, WINKLER, FLANDERS, SMITH, BOTTUM & VILAS, and CRATTY, JARVIS & CLEVELAND, for appellee:

The attachment affidavit follows the language of the statute and is amply sufficient. *Zeigler v. Cox*, 63 Ill. 48; *Keith & Co. v. McDonald*, 31 Ill. App. 17.

The objection to the affidavit, even if it were good, comes too late. It should have been made in the trial court, where the defect, if any existed, could have been cured by amendment. Rev. Stat. chap. 11, sec. 28; *Kruse*

*v. Wilson*, 79 Ill. 233; *Railway Co. v. Radbourn*, 52 Ill. App. 203; *Campbell v. Whetstone*, 3 Scam. 361; *Bickerdike v. Allen*, 152 Ill. 95; *Ellis v. Galesburg Base Ball Ass.* 45 Ill. App. 279; *Lawver v. Langhans*, 85 Ill. 138; *Hogue v. Corbit*, 156 id. 540; *Zeigler v. Cox*, 63 id. 48; *Moore v. Mauck*, 79 id. 391; *Gordon v. Bank*, 144 U. S. 97.

The bond for attachment is in due form, and sufficient. No objections having been made as to its form or sufficiency in the trial or Appellate Courts, such objections cannot be made here. *Black Hills Merc. Co. v. Gardiner*, 57 N. W. Rep. 557; *Shakman v. Koch*, 67 id. 925; *Austin v. Goodbar*, 30 S. W. Rep. 888; *Morris v. Trustees*, 15 Ill. 266; *Lawver v. Langhans*, 85 id. 138.

The unnecessary and insensible statement in the publication notice that the return term of the court began on a day previous to the commencement of the suit is at most a mere irregularity, of which appellant, as garnishee, cannot take advantage. *Waples on Attachment*, 269, 273; *Rogers v. Miller*, 4 Scam. 333; *Forsythe v. Warren*, 62 Ill. 68; *Goudy v. Hall*, 36 id. 313; *Clark v. Marfield*, 72 id. 258; *Michael v. Mace*, 137 id. 485; *Iron v. Keystone Manf. Co.* 61 Iowa, 406; *Kelly v. Harrison*, 12 So. Rep. 261; *Davis v. McCary*, 13 id. 665; *Johnson v. Clark*, 18 Kan. 157; *Marshall v. Marshall*, 13 S. W. Rep. 578; *Kirk v. Dearth Agency*, 68 Ill. App. 468; 171 Ill. 201.

The measure of damages in this case is plain. It is the value of the use of the engines,—namely, their rental value,—for the time of delay, or, if there was no rental value, the interest upon the amount invested. 5 Am. & Eng. Ency. of Law, 25; *Ice Co. v. Jenkins*, 58 Ill. App. 519; *Insurance Co. v. Morgan*, 22 id. 198; *Benton v. Fay & Co.* 64 Ill. 417; *Phelan v. Andrews*, 52 id. 486; *Strong v. Cogswell*, 28 id. 457; *VanBuren v. Diggs*, 11 How. 462.

Delivery, receipt, use and retention of a machine under a contract shows, *prima facie*, it complies with the contract. *Babcock v. Trice*, 18 Ill. 420; *Underwood v. Wolf*, 131 id. 425.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The appeal in this case is prosecuted by a garnishee, against whom judgment has been rendered in an attachment proceeding.

*First*—Appellant claims, that the judgment rendered against it in the attachment proceeding is void for want of jurisdiction in the court rendering it. In an attachment proceeding, the court must acquire jurisdiction over the defendant, and proceed to render judgment against him, before it pronounces judgment against a party who is summoned as a garnishee. The garnishee cannot complain of mere irregularities in the attachment proceeding or judgment, as these affect the attachment defendant only, and must be called in question by him in a direct proceeding. But, if the judgment rendered in the attachment suit is unauthorized and void the judgment against the garnishee has no legal basis for its support. Consequently, it has been held that a garnishee will be permitted to inquire into the validity of the antecedent proceedings, and, if they are void, the judgment against himself will be reversed. This rule rests upon the principle, that the garnishee would not be protected in the payment of a judgment entered by a court, which had no jurisdiction to render it. (*Pierce v. Carleton*, 12 Ill. 358; *Kirk v. Elmer Dearth Agency*, 171 id. 207).

It becomes necessary, therefore, to inquire whether the judgment, rendered in favor of the attachment creditors, Pickands, Brown & Co., against the appellee, was or was not void for want of jurisdiction in the court rendering it. The appellant attacks the judgment upon three grounds: *First*, upon the alleged insufficiency of the attachment affidavit; *second*, upon the alleged insufficiency of the attachment bond; and, *third*, upon the alleged defectiveness of the publication notice in the attachment proceeding.

The ground, upon which the attachment, was issued, was the non-residence of the defendant; and the attachment affidavit is said to be defective, because it does not set up facts, showing the non-residence of the defendant. The defendant in the attachment proceeding is a corporation, viz., the Wilkin Manufacturing Company. The allegation of the affidavit is, that the defendant "is not a resident of this State, and that its place of residence is at Milwaukee in the State of Wisconsin." The contention of appellant is, that a corporation cannot have a residence elsewhere than in the State, which creates it or grants to it its charter; and that, therefore, the allegation in the affidavit should have been, that the appellee corporation was chartered or incorporated by the State of Wisconsin, and not by the State of Illinois.

Section 1 of the Attachment act, provides, that a creditor may have an attachment against the property of his debtor in any one of the following cases: "First, where the debtor is not a resident of this State." Here, the language of the affidavit conforms literally to the language of the statute; and, therefore, the language of the affidavit is sufficient. (*Zeigler v. Cox*, 63 Ill. 48; *Keith & Co. v. McDonald*, 31 Ill. App. 17). Where one proceeds under a statute, and uses the language of the statute in his pleadings, such pleadings, as a general thing, will be sufficient. It may be conceded to be true that the residence of a corporation is in the State which grants its charter, but the affidavit here is sufficient to embrace such a definition of its residence. The allegation, that the defendant is not a resident of this State, and that its place of residence is at Milwaukee in the State of Wisconsin, includes and is equivalent to an allegation, that it was chartered in the State of Wisconsin. The statute does not require the statement in an affidavit for attachment of the facts constituting non-residence.

Even, however, if the affidavit is defective in the respect thus indicated, it is too late to make the objection

to it here, as no such objection was made in the trial court. Section 28 of the Attachment act provides, that "no writ of attachment shall be quashed, nor the property taken thereon restored, nor any garnishee discharged, nor any bond by him canceled, nor any rule entered against the sheriff discharged, on account of any insufficiency of the original affidavit, writ of attachment or attachment bond, if the plaintiff or some credible person for him shall cause a legal and sufficient affidavit or attachment bond to be filed, or the writ to be amended in such time and manner as the court shall direct, and in that event the cause shall proceed as if such proceedings had originally been sufficient." (1 Starr & Cur. Ann. Stat. p. 322). In view of section 28, it is immaterial how defective the affidavit may be originally, if the plaintiff causes a legal and sufficient affidavit to be filed. If the affidavit had been attacked in the trial court, it could have been amended there under section 28; and, if amendable there, it cannot be said to be void. What is amendable is not void. As the validity of the attachment writ depended upon the validity of the affidavit, and the affidavit was voidable merely and not void, the court had jurisdiction over the subject matter of the attachment; and the defect here insisted upon cannot avail the appellant in this collateral proceeding. (*Campbell v. Whetstone*, 3 Scam. 361; *Kruse v. Wilson*, 79 Ill. 233; *Bickerdike v. Allen*, 157 id. 95; *Lawver v. Langhans*, 85 id. 138; *Zeigler v. Cox*, 63 id. 48; *Hogue v. Corbit*, 156 id. 540). The objection here made to the affidavit is based upon a mere irregularity and was not made in the trial court, but was raised for the first time in the Appellate Court. The objection came too late.

The attachment bond is objected to, on the ground that it purports to be the bond of Henry S. Pickands alone, and not the bond of the several persons, composing the firm of Pickands, Brown & Co. This objection was not made in the circuit court, and it is too late to make it here for the reasons already stated in regard to

the affidavit. Section 28 provides, that no writ of attachment shall be quashed on account of any insufficiency of the attachment bond, if a legal and sufficient bond is filed. If the bond had been objected to in the trial court upon the ground here stated, a new bond could have been filed. Section 4 of the Attachment act provides, that "the clerk shall take bond and sufficient security payable to the defendant, against whom the writ is to be issued," etc. There is here no absolute requirement, that the attachment bond shall be signed by all the plaintiffs. The present bond recites, that Henry S. Pickands has prayed an attachment at the suit of Pickands, Brown & Co. against the Wilkin Manufacturing Company. It is true, that, by the terms of said section 4, "every attachment issued without a bond and affidavit taken is hereby declared illegal and void, and shall be dismissed." But the attachment in the present case was not issued without a bond. On the contrary, the bond was given, and, if it was defective because signed by only one of the attachment plaintiffs as principal, instead of being signed by them all, attention should have been called to the matter in the trial court. The defect is not one, which goes to the jurisdiction, so as to justify the garnishee in urging it against the judgment. (*Morris v. Trustees of Schools*, 15 Ill. 266). In *Morris v. Trustees of Schools*, *supra*, we said (p. 268): "It is assigned for error that the bond was defective, because not executed by the plaintiffs in attachment. Such an objection cannot be made for the first time in this court. The statute provides that no attachment shall be dismissed for any insufficiency of the bond, if the plaintiff will cause a sufficient bond to be filed. The objection should have been made in the court below, and an opportunity afforded plaintiffs to obviate it by giving another bond. Unless made and overruled in that court, it cannot be insisted on here."

The objection made to the publication notice is of a more serious character; but we are inclined to the opin-

ion, that it cannot be sustained in this collateral attack, made by the garnishee upon the judgment in the attachment proceeding.

The publication notice reads as follows: "Public notice is hereby given to the said Wilkin Manufacturing Company, that a writ of attachment issued out of the office of the clerk of the circuit court of Cook county, dated the 28th day of August, 1891, at the suit of the above named plaintiffs against the lands, goods, etc. Now, therefore, unless you, the said Wilkin Manufacturing Company, shall personally be and appear before the said circuit court of Cook county, on or before the first day of the next term thereof to be holden at the court house in the said city of Chicago on the third Monday of August, 1891, give bail, and plead to the said plaintiffs' action, judgment will be entered against you," etc. It is conceded, that the third Monday of August, 1891, was the seventeenth day of August. The objection to the notice is, that it requires defendant to appear on a day previous to the commencement of the suit, the suit having been begun by the issuance of the writ on August 28, 1891, and the day, on which defendant is required to appear, being August 17, 1891. Upon the face of the notice, the defendant was required to appear at an impossible date. But it is evident, that the clerk made a mistake by inserting in the notice the words "third Monday of August, 1891," instead of the words, "third Monday of September, 1891." The attachment writ was actually dated and issued on August 28, 1891. The next term of the court, as fixed by statute, began on the third Monday of September, 1891. The defendant was bound to know when the next term of court began. The statement, that it was to appear on the third Monday of August, 1891, may be regarded as surplusage, it being sufficient that it was required to appear at the next term after August 28; and that term was fixed by law as beginning on the third Monday of September.

It appears from the certificate of the publisher, that the notice was published three times, to-wit: on September 9, September 16, and September 23, 1891. It also appears from the certificate of the clerk, that a copy of the notice was mailed to the defendant on September 11, 1891. The presumption of law, in the absence of any proof to the contrary, is, that the notice was received by the defendant in due course of mail. The attachment writ, which is referred to in the notice as having been issued on August 28, directs the sheriff to summon the defendant to appear at a term of court to be held on the twenty-first day of September, 1891. The defendant was, therefore, advised of the error in the date named in the notice. Having in its hands a copy of the notice published on September 9, and mailed to it on September 11, it could not but infer that a mistake had been made in fixing the term of the court as the third Monday of August, instead of the third Monday of September. (*Goudy v. Hall*, 36 Ill. 313; *Clark v. Marfield*, 77 id. 258). In *Rogers v. Miller*, 4 Scam. 333, the summons directed the sheriff to summon the defendants to appear on the first day of the next term of court to be holden at, etc., without specifying the particular time, and it was there held, that the summons was not thereby rendered void or even voidable. In the latter case, we said: "The only object of naming any time in the process is to inform the party with a reasonable certainty of the time at which he may appear. As the time of holding the circuit court is fixed by law, every person not only has the means of knowing, but is presumed to know, when that time is; and this presumption is the less violent, as it is now frequently consonant with truth, and is less likely to work hardship than many other legal presumptions the propriety of which has never been questioned." (See, also, *Forsyth v. Warren*, 62 Ill. 68). The notice here informed the debtor of the attachment, at whose suit it was begun, against whose estate, for what sum, and before what court it was pending. It,

also, required him to appear at the next term of court. Section 22 of the Attachment act requires the notice to state, that defendant must appear "within the time limited for his appearance in such case." The time limited in such case is the next term of court; and the defendant is presumed to know when, under the law, the next term of court begins.

Our conclusion upon this branch of the case is, that the judgment in the attachment proceeding was not invalid by reason of any of the objections thus urged against it, and that, inasmuch as the court, rendering it, had proper jurisdiction in the premises, the appellant, as garnishee, cannot successfully sustain an attack against it.

*Second*—Appellant contends, that the trial court gave a wrong construction to the contract in question, and, in pursuance of the construction so adopted, improperly excluded evidence offered by appellant, and improperly refused to hold as law certain propositions submitted by appellant. We are inclined to the opinion, that this contention of the appellant is correct, and that the action of the trial court upon this subject was erroneous.

By the terms of the contract, the appellee, the Wilkin Manufacturing Company, said: "We guarantee all these to be of the best material and workmanship, and to be equal or superior to any blowing engine on the market." In the first clause of the contract, appellee had said: "We propose to furnish you two blowing engines complete, as per specifications enclosed." The statement, that the specifications were enclosed in the letter of July 2, 1890, was afterwards corrected and modified by the statement, that the specifications were enclosed in a prior letter of June 24. The theory, upon which the trial court tried the case, was, that it was not competent to prove that other blowing engines on the market at the time of the contract were equal or superior to those constructed by the appellee, unless it was also shown that said engines were constructed in accordance with the same specifica-

tions. In the course of the trial, the judge of the circuit court made the following rulings, viz.: "If you can show that any other engine of precisely the same specifications, or substantially the same specifications, named here, was on the market at the time, I will allow you to compare the engine, but it must not differ in specifications in any material way." Again: "I will state to you now, that, if you can find any engine that was on the market then, constructed on the same specifications that these engines were constructed on, viz.: the specifications written and attached to this contract, I will allow you to compare these engines." On the contrary, the theory of appellant was and is, that the Wilkin Manufacturing Company guaranteed the plan, scheme or device of the engines, and undertook that, when built according to the specifications, they would be as good for the purpose for which they were intended, as any engines which could have been purchased from any other manufacturer of like wares. Accordingly, the appellant submitted to the court to hold as law, in the decision of the case, propositions to the effect, that the words, "equal or superior to any blowing engine on the market" are equivalent to an undertaking or agreement on the part of the Wilkin Manufacturing Company, that the engines should be constructed in such manner, as to make them equal or superior in workmanship, and on such plan as to make them as efficient in service, as any blowing engine on the market. The propositions so submitted by the appellant were refused by the trial court; and all the evidence offered by the appellant, tending to support its theory, was excluded by the court. In this we think there was error.

The specifications, after giving a general description of the type of the engines, describe the cylinders, piston rods, connecting rods, fly-wheels, valve-gear, etc., constituting the various parts of the engine. The words, "all these," in the contract refer not merely to the two engines as wholes, but to the various parts of which they

were thus made up. Appellee guaranteed that the engines and all their parts should be not only of the best material and workmanship, but also should be equal or superior to any blowing engine on the market; that is to say, that the engines in question and all their parts, constructed according to the specifications named, should be equal, in the accomplishment of the purpose and design for which a blowing engine is intended, to any other engine on the market, whether constructed according to the same specifications or not. Surely, the guaranty included something else besides the best material and workmanship; and the only other respect, in which the proposed engines could be made equal or superior to any blowing engine on the market, would be in their fitness and adaptability to effect the object, for which a blowing engine is used. An engine, built according to the particular specifications named, may be effective as a blowing engine, and another engine, built according to different specifications, may be equally effective as a blowing engine. The guaranty was not necessarily, that the engines named were to be as large, or as strong, or to do as much work, as engines twice as large might have done, but that the plan, scheme, type, or design should be equal or superior to any other engine. In other words, an engine of a certain size might be more effective for the purpose intended, if built upon a proper plan, than an engine twice as large would be, if built upon an improper plan.

The specifications in question were prepared by appellee, and not by appellant; and, therefore, the cases referred to by counsel, where the purchasers of machines or engines specify the particulars of their construction, do not apply. (*J. I. Case Plow Works v. Niles & Scott Co.* 90 Wis. 590; *Milwaukee Boiler Co. v. Duncan*, 87 id. 120). Where engines or machines are made specially for the purchaser thereof, and such purchaser specifies sizes, dimensions, and material, and examines and tests in advance engines or machines of the kind manufactured by the seller, he

takes the risk of their fitness for the use for which they are intended, and, in the absence of any written or oral warranty, no warranty of the suitableness of the engines or machines for the purpose desired can be implied. Here, however, the appellant did not order the engines to be constructed according to the specifications furnished by the appellant, but the appellee offered to supply engines built according to specifications made by appellee itself. Hence, the contract here was not for the manufacture and delivery of a specific kind or plan of engine of specified dimensions and sizes, but for the manufacture of engines to satisfy the required purpose. The appellant was building a blast furnace, and required a blowing engine in the operation of it. Where a manufacturer contracts to supply an article, which he manufactures, to be applied to a particular purpose, so that the buyer trusts to the judgment or skill of the manufacturer, there is ordinarily an implied warranty, that the article will be reasonably fit for the purpose, to which it is to be applied. Here, however, there is an express warranty, so that it is not necessary to resort to the doctrine of implied warranty. The test in such a case is, whether the purchaser trusts and relies upon the judgment of the manufacturer, and not upon his own judgment. That this was the construction, intended by the contract, appears from the following statement therein: "Payments to be made as follows: Fifty per cent on shipment, the balance when the engines are in successful operation," etc. They could not be in successful operation, unless they were so operated, as to fulfill the purpose and design for which such an engine is intended. In *City of Lake View v. MacRitchie*, 134 Ill. 203, the contract between the contractors and the town for laying a water pipe, etc., referred to the specifications and plans thereto attached, and the specifications provided, that all of the work to be guaranteed was to remain in good condition for one year from date of acceptance; it was there held that

such guaranty was as effectually made a part of the contract, as if its words had been incorporated in it; and we there said: "No reason is perceived why contractors may not guarantee against all defects, whatever their origin—whether they arise from insufficiency of the materials supplied, from unskillfulness of workmen, or from unfitness of the plan or design—whether devised by the one or the other of the parties to the contract, or by some other person."

The court below refused to allow the appellant to prove whether the engines in question were built of the best material and according to the best workmanship or not; or whether they were designed and constructed in a workmanlike manner; or whether the plan and manner of their construction were good or bad; or what kind of engines were then on the market; or whether the fly-wheels named in the specifications, which are generally counter-balanced, were good or not without the counter-balance; or whether the valve and valve-gear were properly adjusted or constructed. Without going further into detail, we cannot resist the conclusion, that appellant was not permitted fairly to present its theory of the case. Where a case is tried upon an erroneous or mistaken theory of law, the judgment should be reversed, and the case sent back for a new trial. (*Bright v. Kenefick*, 69 Ill. App. 43; *Kimball v. Doggett*, 62 id. 528). Even though the appellant received and used the engines, it was competent for it to show by way of recoupment, if it could do so, that they were not constructed according to the contract, or suitable for the purpose for which they were intended. (*Underwood v. Wolf*, 131 Ill. 425; *Morris v. Wibaux*, 159 id. 627).

*Third*—Appellant further objects, that the court below held the provision in the supplemental contract for the payment of \$50.00 a day to be a penalty, and not liquidated damages. After a careful consideration of all the provisions of the supplemental contract, we are of the opinion that the parties intended the payment of the

\$50.00 a day to be a penalty, and not liquidated damages. Where a contract provides for the payment, as a penalty, of a certain sum per day for delay in the delivery of an article, the only damages, which will be awarded, are the actual damages suffered on account of the delay; but where the sum to be paid is intended to be liquidated damages, such amount may be recovered irrespective of the question what damages were actually sustained. In the present case, our attention has not been called to any proof, introduced or offered by the appellant to show that actual damages were sustained by the delay in the delivery of the engines after May 1, 1891. It is also to be observed, that the appellant garnishee does not, in its answer, specifically set up its claim to the payment of \$50.00 per day for the period between May 1, 1891, when the engines were to be delivered according to the terms of the contract, and September 13, 1891, when, as it is claimed, they were in fact delivered. It is oftentimes difficult to determine, whether a sum, named in an agreement as damages for its breach, will be treated as liquidated damages, or as a penalty. The application, however, of a few rules leads us to the conclusion that, in this case, the amount specified was intended merely to secure a prompt delivery of the engines, and was not an estimate by the parties of the actual damages suffered by the delay.

One of these rules is, that "the word 'penalty' *prima facie* excludes the notion of stipulated damages," although the use of either the word "penalty," or the words "liquidated damages" is not conclusive. (5 Am. & Eng. Ency. of Law, 24; *Scofield v. Tompkins*, 95 Ill. 190). One of the recitals in the supplemental contract speaks of the desire of the purchaser, that the contract should contain "a penalty in the nature of stipulated damages." Thus, the parties themselves designate the sum, to be paid, as damages for failure to furnish the engines at the time specified, as a penalty, although it is not apparent what is meant by a "penalty in the nature of liquidated dam-

ages." It is true, that the word "penalty" is used in the reciting part of the contract, and that recitals in an agreement do not of themselves alone have any obligatory force; "but they may be referred to in the operative part of an instrument in such a way as to show that they were designed to form a part of it." (*Trower v. Elder*, 77 Ill. 452). It is manifest that the recital here in the supplemental contract in regard to the penalty is referred to afterwards in the operative part of the contract.

Another one of the well established rules for determining, whether the amount is a penalty or liquidated damages, is, that, "in doubtful cases, the courts are inclined to construe the stipulated sum as a penalty." (5 Am. & Eng. Ency. of Law, 27). The supplemental contract in the present case is, in some of its terms, indefinite and uncertain as to the true meaning thereof. For instance, the contract provides, that the Wilkin Manufacturing Company will pay to the Iroquois Furnace Company, as liquidated damages for any delay which shall ensue after the first of April as to the first engine, and after the first of May as to the second engine, "the sum of \$50.00 per day, for all time which the delivery of said engines shall be delayed after May 1, 1891." It seems to be doubtful whether or not the contract means, that, if one engine shall be delivered on the first of April, and the other not delivered until after the first of May, \$50.00 shall be allowed only for each day that the delivery of the latter one is delayed. And yet the meaning of the contract cannot be said to be, that, if the delivery of both engines is delayed beyond May 1, \$100.00 per day shall be paid, because, if this were the meaning, the contract would have provided for the payment of \$50.00 per day for all the time, during which the delivery of such engines or either of them would be delayed beyond the respective days named. The first part of the last clause of the supplemental contract would seem to mean, that the sum of \$50.00 per day should be allowed as liquidated

damages, if the first engine should not be delivered on April 1, and that an additional \$50.00 should be allowed, if the second engine should not be delivered on May 1. But the contract proceeds to say, that the sum of \$50.00 per day shall be allowed for all the time, during which the delivery of such engines shall be delayed after May 1, 1891. The agreement is thus, on its face, doubtful in meaning, if not actually inconsistent with itself. The specifications show, that the engines were composed of different parts, and that they were to be erected under the superintendence of a man furnished by the appellee after the delivery of these parts. If the great bulk of these parts should be delivered by May 1, but some unimportant part should not be delivered for a considerable time after the main body of the engines was delivered, then the whole penalty could be recovered, upon the theory that all the parts, constituting the whole of the two engines, should be delivered on May 1. (*Colwell v. Foulks*, 36 How. Pr. 306; *Colwell v. Lawrence*, 36 Barb. 643).

Another rule of construction is that, where an agreement contains several stipulations of various degrees of importance, as to some of which the damages might be considered liquidated, whilst the damages for the non-performance of the others are not measurable by any exact pecuniary standard, and a sum of money is made payable in gross for a breach of any of them, such sum is held to be a penalty only, and not liquidated damages. (5 Am. & Eng. Ency. of Law, 26; *Trower v. Elder*, *supra*; Parsons on Contracts,—7th ed.—171; 1 Sutherland on Damages, 508). The contract here provided for the delivery of two engines, instead of one, at different times, and the proof showed that the engines consisted of different parts, and that these parts were to be erected into engines after their delivery. While it might be possible to estimate the damages resulting from delay in the delivery of the first engine, thereby preventing the beginning of their erection, it might be difficult to estimate

damages resulting from delay in the delivery of the two engines, or of the second one.

In addition to what has already been said, the testimony tends to show that the appellant did not insist upon the prompt delivery on May 1 of all the parts of the engines, thereby appearing to waive its right to insist upon such prompt delivery. It is conceded that the material, out of which the engines were to be constructed, was not delivered until after July 1, 1891, although the contract required the delivery on May 1, 1891. The appellant paid towards the purchase money of the engines \$6375.00 on July 21, 1891, and \$6375.00 on August 11, 1891. The parts of the engines were not shipped until after July 7, 1891. The appellant did not inform appellee, that it intended to claim \$50.00 a day as liquidated damages, when it made these payments. It is a serious question whether the making of such payments, after default had been made in the delivery of the engines, and after said delivery had been delayed several months after the time of delivery fixed in the contract, was not calculated to lead the appellee to understand that the appellant did not consider the sum of \$50.00 a day as liquidated damages. If the amount agreed to be paid for breach of the contract greatly exceeded the actual damages suffered by the appellant on account of the delay in the delivery; that is to say, if the amount agreed to be paid is out of proportion to the probable damages sustained, the court will be disposed to treat the stipulated sum as a penalty. (*Scofield v. Tompkins, supra; Connelly v. Prost*, 72 Mo. App. 673).

For the error in the construction of the contract as above indicated, the judgments of the Appellate and circuit courts are reversed, and the cause is remanded to the circuit court with instructions to proceed in accordance with the views herein expressed.

*Reversed and remanded.*

## THE CHICAGO GENERAL RAILWAY COMPANY

v.

CHICAGO, BURLINGTON AND QUINCY RAILROAD CO. *et al.**Opinion filed October 19, 1899.*

181	605
186	*398
181	605
199	*347
181	605
201	*291
181	605
104a	*483
181	605
210	*463

1. **STREET RAILWAYS**—*company may complain of obstruction preventing running of cars.* The running of cars by a street railway is one of the uses for which streets are laid out and maintained, and a company authorized to operate such a line has the right to complain of any obstruction in the street which prevents it.

2. **STREETS AND ALLEYS**—*railroad company must construct sub-ways to permit passage of ordinary vehicles.* The power which a city has over its streets in the matter of compelling railroad companies to raise their tracks must be so exercised as not to interfere with the use of the streets or crossings by the persons entitled thereto; and a railroad company, under section 19 of the Railroad act, (Rev. Stat. 1874, p. 803,) requiring it to restore the street to such state as not unnecessarily to impair its usefulness, must so construct sub-ways as to permit the passage of street cars or vehicles of ordinary size.

3. **INJUNCTION**—*private party must sustain special irreparable damage to enjoin obstruction of street.* An individual can file a bill for injunction against the obstruction of a public highway only when it is shown that he will suffer special and irreparable damage, different in degree and kind from that suffered by the public at large.

4. **SAME**—*when street railway cannot enjoin construction of sub-way by railroad.* A street railway company is not entitled to enjoin the construction, by an intersecting railroad company, of sub-ways of a clear head-room of less than sixteen feet, although a lower sub-way will prevent it from operating an uncertain and indefinite portion of its cars, as the injury resulting from cutting down such cars is capable of estimation in damages at law.

5. **SAME**—*allegations of bill must not be uncertain with respect to the alleged injury.* An allegation in a bill filed by a street railway company to enjoin an intersecting railroad company from constructing sub-ways having less than sixteen feet of clear head-room, that otherwise the complainant will not be able to connect with suburban railways, the cars upon which are averred to be sixteen feet high, *more or less*, is uncertain and will not warrant relief.

6. **SAME**—*when injunction will not be granted to prevent a multiplicity of suits.* Relief by injunction cannot be granted on the ground that a multiplicity of suits will thereby be avoided, when the controversy is between two persons for themselves alone, and there are not different persons assailing the same rights.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding.

This is a bill for an injunction, filed by the plaintiff in error against the defendants in error, the city of Chicago and the Chicago, Burlington and Quincy Railroad Company, to enjoin the latter from erecting on Twenty-second street and Lawndale avenue in Chicago, where the right of way of said railroad company crosses and intersects said streets, any alleged obstructions, which shall create sub-ways at those points of a clear head-room of less than sixteen feet or from maintaining the same, or from interfering with the operation of all or any of the cars of plaintiff in error. A demurrer was filed to the bill, and sustained by the court below; and the bill was ordered to be dismissed for want of equity. The present writ of error is sued out for the purpose of reviewing the decree of the trial court, sustaining the demurrer and dismissing the bill.

The plaintiff in error is operating a street railway, propelling its cars by means of electricity under the trolley system on Twenty-second street and Lawndale avenue. The Chicago, Burlington and Quincy Railroad Company crosses those streets at certain points, and the cars of plaintiff in error cross the railroad crossings on those streets, made by the intersection with them of the tracks of said railroad company. By an ordinance passed on June 24, 1898, the Chicago, Burlington and Quincy Railroad Company was required to elevate its road-bed and tracks between certain points, and to construct sub-ways under its tracks in Lawndale avenue and Twenty-second street with a clear head-room of twelve and five-tenths feet, or, as is alleged in the bill, of twelve and one-half feet. The bill charges that the Chicago, Burlington and Quincy Railroad Company is proceeding to elevate its tracks and to build sub-ways in Twenty-second street and Lawndale avenue with a head-room

of only twelve and one-half feet in accordance with said ordinance of June 24, 1898. When these sub-ways are built, the cars of plaintiff in error must pass thereunder. The bill charges, in substance, that the railroad company has no right or authority to cross these streets with elevated tracks without making sub-ways at the crossings under its tracks, which shall have a clear head-room of not less than sixteen feet, instead of twelve and one-half feet. It is alleged that thereby various constitutional provisions, alleged to have a bearing upon the rights of plaintiff in error are violated.

CHARLES L. BONNEY, and GLENN E. PLUMB, for plaintiff in error.

C. M. WALKER, and S. A. LYNDE, for defendants in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

Lawndale avenue and Twenty-second street in Chicago are public highways. Neither the city alone, nor the city in conjunction with any railroad company, has the right to build or erect in these public highways any permanent obstruction, which shall interfere with the passage over the same of all persons and vehicles, having the right to use the public streets. The plaintiff in error operates its street cars under articles of incorporation authorized by the general railway law of the State, and under an ordinance passed by the city of Chicago, permitting it to lay its tracks in certain streets. There is nothing in the charter of the plaintiff in error, or in the ordinance giving it authority to occupy the streets, which specifies any particular kind of street cars, or the nature of the power by which such cars shall be propelled, or the size or height of the cars. The running of cars by a street railway in the streets of a city for the

transportation of passengers is one of the uses, for which streets are laid out and maintained. It is clear, therefore, that plaintiff in error would have the right to complain, if any such obstruction is placed in the public streets, upon which its tracks are laid, as will prevent the operation of its road by the running of its cars.

The ordinance, under which the railroad company is required to elevate its tracks at points where it crosses Twenty-second street and Lawndale avenue, was passed under the powers conferred upon the city of Chicago by its charter. Under its charter, the city of Chicago has the power "to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same." It also has thereunder the power to "regulate the use of the" streets, and to "prevent and remove encroachments or obstructions upon the same;" also "to provide for and change the location, grade, and crossings of any railroad;" also "to compel such railroad to raise or lower its tracks to conform to any grade, which may, at any time, be established by such city." (Rev. Stat. chap. 24, pt. 1, art. 5, sec. 1, pars. 7-10, 25, 27).

Section 19 of chapter 114 of the Revised Statutes, being the act in regard to the incorporation of railroads, provides that every corporation, formed under that act, shall have the power "to construct its railway across, along, or upon any \* \* \* street, highway, \* \* \* which the route of such railway shall intersect or touch; but such corporation shall restore the \* \* \* street, highway, \* \* \* thus intersected or touched, to its former state, or to such state as not unnecessarily to have impaired its usefulness, and keep such crossing in repair: *Provided*, \* \* \* nothing in this act contained shall be construed to authorize \* \* \* the construction of any railroad upon or across any street in any city \* \* \* without the assent of the corporation of such city." (2 Starr & Curt. Stat. p. 1913).

Municipal corporations and railroad corporations both derive their powers from the State. When a railroad company constructs its railway across the street of a city, it must restore the street to such condition as not unnecessarily to impair its usefulness. If its crossing is so constructed as to prevent the passage along the street of any person or car or vehicle, which has the right to use the street, it does not restore it "to such state as not unnecessarily to impair its usefulness." So, notwithstanding the power which the city has over its streets, it must so exercise that power in the matter of compelling railroad companies to raise their tracks, as not to interfere with the use of the streets or crossings by all persons entitled thereto.

If, when the tracks of a railroad company are raised, the sub-way to be built thereunder is so low, as to prevent the passage of such vehicles as have the right to pass thereunder, there is a failure, on the part both of the railroad company and of the city, to perform the duties imposed upon them by law.

The charge made against the ordinance of June 24, 1898, is two-fold: First, that it permits the railroad company to occupy six feet of the roadway in the two streets in question with its abutments; and, second, that it authorizes the railroad company to construct a sub-way only twelve and one-half feet high, instead of a sub-way sixteen feet high. It is alleged in the bill, that the streets in question are sixty-six feet wide, and that, when the abutments, supporting the tracks of the railroad company at the crossings, are built, they will occupy such space as will make the roadway only sixty feet wide. It is not alleged in the bill, nor does it appear to be the fact, that this narrowing of the roadway will work any injury to plaintiff in error, because its tracks lie within the sixty feet of the narrowed street, and there is room enough for the passage of its cars, even if the abutments to be constructed should occupy six feet of the street.

It is well settled that, where the obstruction to a street does not result in any special damage to the individual, he has no right to complain; but the proceeding for the removal of the obstruction must be by or on behalf of the public. In such case, the public alone can complain. The individual can only file a bill for injunction against the obstruction of a public highway, when it is shown that he will suffer special damage different in degree and kind from that suffered by the public at large. (*Barrows v. City of Sycamore*, 150 Ill. 588; *City of Chicago v. Union Building Ass.* 102 id. 379). It may be, that the public, acting through the Attorney General or State's attorney, or through the city itself, might enjoin the obstruction of the streets in question by the abutments thus to be constructed, but, as it does not appear, that the plaintiff in error will suffer any special damage by reason thereof, it is not entitled to an injunction to prevent the erection of the same.

All the injuries, which are complained of in the bill, are those which are alleged to result from the building of a sub-way under the tracks at the crossings, which is less than sixteen feet high. The question then arises, whether, upon the allegations of the present bill, the plaintiff in error is entitled to an injunction against the construction of sub-ways at the points in question, which are only twelve and one-half feet high.

Obstructions to public highways are public nuisances. Courts of equity will not interpose by injunction to prevent the creation of a nuisance or purpresture, when the right is doubtful, and there is a remedy at law, and when the party asking the aid of equity shows no private injury actually sustained, or justly apprehended by him. A court of equity will not interpose to prevent the obstruction of a public highway at the instance of a private individual, merely because such obstruction is a public nuisance, but it must further appear that such obstruction will work a special injury to the individual.

complaining. The injury in such case must be one, which cannot be compensated in an action at law. Where the bill to enjoin the obstruction, which is alleged to constitute a public nuisance, is filed by a private individual, it must not only be shown that he will suffer a special injury, but also that he will sustain irreparable damage. Where it does not appear that there will be irreparable damage, the relief will not be granted, even though the complainant may show a special and personal injury. (1 High on Injunctions,—3d ed.—sec. 817; *Keystone Bridge Co. v. Summers*, 13 W. Va. 484; *Draper v. Mackey*, 35 Ark. 499; Elliott on Roads and Streets, pp. 496, 497; *Green v. Oakes*, 17 Ill. 249). When irreparable injury is spoken of, it is not meant that the injury is beyond the possibility of repair, or beyond the possibility of compensation in damages, but it must be of such constant and frequent recurrence, that no fair or reasonable redress can be had therefor in a court of law. (2 Wood on Nuisances,—3d ed.—sec. 778; Elliott on Roads and Streets, p. 497).

Where, however, the right of the public to the use of a highway is clear, and a special injury is threatened by the obstruction of the highway, and this special injury is serious, reaching the very substance and value of the plaintiff's estate, and is permanent in its character, a court of equity will prevent the nuisance by injunction. (*Keystone Bridge Co. v. Summers*, *supra*). In *Snell v. Buresh*, 123 Ill. 151, we said: "While courts of equity will not interfere by injunction to prevent the obstruction of a highway or the creation of a nuisance when the right may be doubtful and there is a remedy at law, yet, as said in *Green v. Oakes*, 17 Ill. 249, where the right is clear, and appertains to the public, and an individual is directly and injuriously affected by the obstruction or the creation of a nuisance, they will interfere, on the application of such individual, to prevent the threatened wrong or invasion of the common right."

In the case at bar, the bill alleges that the cars in use on the tracks of the plaintiff in error "are of the height of twelve and one-half feet, thirteen feet, thirteen and one-half feet, and fourteen feet, *more or less*, respectively, and that said cars are operated by electricity by what is commonly known as the trolley system, and, in order that the said cars may be operated through and under such a sub-way, there must be at least two feet clear head-room between the roof of said cars and the said sub-way to make way for the trolley appliances, by which said cars are operated." The bill further alleges "that said head-room of twelve and one-half feet, as established by said ordinance of June 24, 1898, will absolutely prevent your orator from operating *a portion of its equipment* from its said line of road on one side of said sub-ways to the line of road of your orator on the opposite side of said sub-ways." By the use of the words, "more or less," the bill leaves it uncertain what is the exact height of the cars used by the plaintiff in error on its tracks. There is no allegation, that the cars are of any particular height, but that they are of a height which is more or less than a certain number of feet. It may as well be presumed, that the height of the cars is less than the number of feet mentioned, as that it is more than such number of feet. If it is less, it may be that the cars can easily pass under a sub-way which is only twelve and one-half feet high. The charge of the plaintiff in error is not that the sub-way in question will prevent the total and entire operation of its road, but that it will be prevented from operating "a portion of its equipment." There is nothing to indicate how large "a portion of its equipment" may be thus interfered with. The bill thus leaves it indefinite and uncertain as to the extent to which the plaintiff in error will suffer injury. Such cars of the plaintiff in error, as may be too high to pass through the sub-way, may be made lower. The cost of making such cars lower would be a matter of damage

that could be definitely ascertained, and could, therefore, be recovered in an action at law. It is not alleged in the bill, that the city of Chicago, or that the Chicago, Burlington and Quincy Railroad Company, is insolvent, or unable to respond in damages for the injury suffered. It is fair to assume from the allegations of the bill, that the greater part of the cars used by the plaintiff in error are of such height, that they can pass under the sub-way to be constructed at a height of only twelve and one-half feet. We are unable to say, from the allegations of this bill, that that portion of the public, represented by the plaintiff in error, has a clear right to use the streets in question at the points named with cars of such height that they can only pass through a sub-way sixteen feet high. Nor are we able to say, that the special injury with which plaintiff is threatened by the contemplated obstruction, will be an injury of a permanent character. The city is not obliged to make a sub-way high enough for the passage of vehicles of an extraordinary and unnecessarily great height. It is only obliged to make such a sub-way as will permit the passage of such cars, or cars of such height, as are customarily and ordinarily run upon street railway tracks.

As to the allegation, that plaintiff in error will not be able to connect with suburban railways, so as to run its cars upon the tracks of the latter, such allegation is not that the cars upon these suburban railways are sixteen feet high, but that they are sixteen feet *more or less*. In view of the great importance to the public of securing greater safety and greater freedom from accidents by the improvement to be made by the elevation of the tracks of the railroad company in question, such improvement ought not to be stopped or interfered with, where the relief prayed is expressed in such doubtful and uncertain terms, as are used in the bill in this case.

Plaintiff in error not only does not show that such injury as it may suffer will be irreparable, but it does not

show that the interference of a court of equity will be justified upon the ground that, thereby, a multiplicity of suits will be avoided. To warrant interference upon the ground of a multiplicity of suits, there must be different persons assailing the same rights, and not a mere repetition of the same trespass by the same person, the case being susceptible of compensation in damages. It is well settled, that, if the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed. (*Chicago Public Stock Exchange v. McClaughry*, 148 Ill. 372).

We are of the opinion that the court below committed no error in sustaining the demurrer to the bill. Accordingly, the decree of the superior court of Cook county is affirmed.

*Decree affirmed.*

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JOHN N. ENGLISH, Admr.

*v.*

MILO LANDON *et al.*

*Opinion filed October 16, 1899.*

181 614  
106a 217

1. **WITNESSES**—when maker of note is competent in behalf of sureties after payee's death. In a proceeding in chancery by sureties upon a promissory note to enjoin the prosecution of an action against them by the payee's administrator, the maker is a competent witness to show, in behalf of the sureties, an extension of time to him by the payee, and the bill may be filed for the purpose of procuring such testimony.

2. **EVIDENCE**—creditor has burden of proving surety's full knowledge of creditor's acts. The burden of proving that a surety had full knowledge of the acts of the creditor relied upon as sufficient to release the surety from liability rests upon the creditor.

3. **SURETIES**—agreement to extend time need not be based on a money consideration, to release surety. An agreement by a creditor, made without assent of the surety, to extend the time of payment will effect his discharge if based on mutual promises, although there is no actual money consideration.

4. **SAME**—payment of interest in advance will support promise to extend time—effect as evidence. Payment of legal interest on a debt in ad-

vance is a sufficient consideration to support an agreement for the extension of the time of payment, and is of itself sufficient *prima facie* evidence of such an agreement to discharge the surety.\*

5. *SAME—payment of interest due, upon a promise to extend time, does not release surety.* The mere payment of principal or interest actually due will not support an agreement by a creditor, made without the surety's consent, to extend the time of payment, so as to work the discharge of the surety, but there must be a mutual intention to pay and receive a consideration therefor extending the time of payment beyond maturity to a specified date.

6. *SAME—promise to extend time indefinitely without consideration does not release surety.* A promise of indulgence made by the payee to the principal debtor without consideration and for no definite time will not work a discharge of the surety.

7. *SAME—when surety is not released by extension of time.* An extension of the time of payment made without consideration, for an indefinite period, is not mutually binding on the parties, and will not release a surety on the ground that it is a valuable right to have money placed on interest, and a valuable right, by discharge of the obligation, to avoid payment of interest.

*Landon v. English*, 75 Ill. App. 483, reversed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Jersey county; the Hon. ROBERT B. SHIRLEY, Judge, presiding.

HAMILTON & HAMILTON, for appellant:

The payment of interest when due is no consideration for an agreement to extend the time of payment. *Crossman v. Wohlleben*, 90 Ill. 542.

In order to effect a release of the sureties there must be shown to have been an agreement between the principal maker and the payee in the note that the time of payment shall be extended after maturity for a definite time, and also that the principal maker shall keep the money during this definite time and pay the interest. *Reynolds v. Barnard*, 36 Ill. App. 222; *Dodgson v. Henderson*, 113 Ill. 364; *Crossman v. Wohlleben*, 90 id. 542.

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\*On the question of the performance of an existing contract obligation as consideration for a new promise, see note to *Abbott v. Doane*, (Mass.) 34 L. R. A. 33.

THOMAS F. FERNS, and ED. J. VAUGHN, for appellees:

If, by a valid and binding agreement between the creditor and the principal maker of a note, the time of payment is extended for a definite period without the consent of the surety, the surety is discharged. 2 Brandt on Suretyship, (2d ed.) sec. 342; *Bank v. Pierce*, 99 Ill. 272; *Dodgson v. Henderson*, 113 id. 360; *Price v. Bank*, 124 id. 317; *Bank v. Estate of Waterman*, 134 id. 461.

The payment of legal interest on a debt in advance is sufficient consideration to support an agreement for an extension of the time of payment thereof; and such payment, in advance of interest, by the principal, is of itself sufficient *prima facie* evidence of an agreement to extend the time of payment, and works the discharge of the surety. 2 Brandt on Suretyship, (2d ed.) sec. 352; *Flynn v. Mudd*, 27 Ill. 323; *Warner v. Campbell*, 26 id. 282; *Maher v. Lanfrom*, 86 id. 513; *Woolford v. Dow*, 34 id. 428; *Crossman v. Wohlleben*, 90 id. 537; *Stearns v. Sweet*, 78 id. 446.

The payment of even a small portion of the debt only a very short time before maturity will support a promise to extend the time of payment. 2 Brandt on Suretyship, (2d ed.) sec. 353, p. 514.

Any material alteration of the contract, or the substitution of a new contract, without the consent of the surety, will discharge him. *Davis v. People*, 1 Gilm. 409; 2 Brandt on Suretyship, (2d ed.) sec. 378; *White v. Walker*, 31 Ill. 422; *People v. Seelye*, 146 id. 189.

Nor does it matter that the alteration is of a trivial character, or even for the benefit of the surety. 2 Brandt on Suretyship, (2d ed.) sec. 388, and notes 1, 2 and 3; *Mix v. Singleton*, 86 Ill. 194; *Ryan v. Trustees*, 14 id. 20; 2 High on Injunctions, (3d ed.) sec. 1376.

A reduction of the rate of interest discharges the surety. It terminates the original contract and substitutes a new one to which the surety is not a party. *Field v. Brokaw*, 14 Ill. 654; *Bethune v. Dozier*, 10 Ga. 235; *Miller v. Stewart*, 4 Wash. C. C. 26; *Mackey v. Dodge*, 5 Ala. 388.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

On the sixth day of September, 1884, William F. Sandidge borrowed of Jonathan E. Cooper \$300, and made and delivered to the latter a promissory note for that amount, due one year from date, with interest at the rate of eight per cent per annum from date, with Milo Landon and William Sinclair as sureties thereon. In October, 1895, Cooper died, and John N. English was appointed his administrator with the will annexed. In January, 1897, the administrator brought suit on the note against the three makers. Thereupon Landon and Sinclair filed a bill in chancery to enjoin further prosecution of the suit, upon the ground they were released from liability as sureties for Sandidge by reason of Cooper extending the time of payment of the note without their knowledge or consent.

Upon the final hearing the only witness called and examined was William F. Sandidge, who was one of the defendants to the bill. The material parts of the testimony upon the question of extending the time of payment and reducing the rate of interest to be paid are as follows: "He gave me time, from time to time, on the note,—from year to year extended the time. First instance was the year the first interest would be due, in 1885. After the first year I went to Cooper and told him I was not able to pay the note off—I would like for him to extend it for another year. He did so. I paid him the interest and he extended it. He said, 'Pay me the interest,'—that was all he wanted; that would be his remark,—that he would be willing to extend the note by my paying the interest. I paid the interest at the time. When I did not feel able to pay the note I would request an extension. He would grant it by my paying the interest. In 1891, at C. & A. depot, I tendered him the full interest and part of the principal. I says, 'Uncle Cap, I can pay you the interest and half of the principal if you wish it.' He says, 'I don't need the money anyway;

I would want to loan it, and I don't know where I could loan it right away; I would just as soon you would keep it.' He said, 'The interest from this time on, Billy, will be only seven per cent.' I think every time I paid Cooper himself I paid the interest before it was due. After the first of September I don't think I paid any interest to Cooper. Usually paid it between the fifteenth of August and the first of September. Last time I paid Cooper was in 1891, at railroad, some time between the fifteenth of August and the first of September.

Q. "You didn't ever pay him at the end of the year?"

A. "No, sir.

Q. "Any verbal change this time, in 1891?"

A. "Nothing more than what he said. He says, 'Billy, the interest shall be only seven per cent from now on.'

Q. "Was that one of the times when he said you could have it another year?"

A. "Yes, sir; one of the times."

The court, on hearing, dismissed the bill. On appeal to the Appellate Court for the Third District the decree of the circuit court was reversed and the cause remanded, with directions, and this appeal is prosecuted.

Whilst, on the death of the payee of a note then in possession thereof, the principal maker would not be a competent witness in behalf of the sureties to show an extension of time to the principal by the payee, in an action at law, he is competent in a proceeding in chancery, and a bill like this may be filed for the purpose of procuring his testimony. *Dodgson v. Henderson*, 113 Ill. 360; *Kennedy v. Evans*, 31 id. 258; *Bradshaw v. Combs*, 102 id. 428.

Whatever amounts to a material alteration of a contract is the substitution of a new contract, and when, without the assent of the surety, it is done, it will effect his discharge. One promise is a sufficient consideration for another, and an actual money consideration is not required to effect an extension of time. *Cooke v. Murphy*, 70 Ill. 96; *Pool v. Docker*, 92 id. 501; *Thayer v. Allison*, 109 id. 180.

The payment of legal interest on a debt in advance is a sufficient consideration to support an agreement for an extension of the time of payment thereof, and such payment of interest by the principal is of itself sufficient *prima facie* evidence of an agreement to extend the time of payment and works the discharge of the surety. *Warner v. Campbell*, 26 Ill. 282; *Flynn v. Mudd*, 27 id. 323; *Maher v. Lanfrom*, 86 id. 513; *Woolford v. Dow*, 34 id. 424; *Crossman v. Wohlleben*, 90 id. 537; *Stearns v. Sweet*, 78 id. 446.

Where a material change of contract between the payee and the principal maker clearly appears from the evidence, and that fact is established, the burden of proving the surety had full knowledge of the acts which released him rests upon the creditor. *Gamage v. Hutchins*, 23 Me. 565.

To effect a discharge of a surety by such extension of time the evidence must show a new contract was made. It must show the time of payment was extended beyond maturity; for a definite time and for a good or valuable consideration. The mere payment of a part of the principal actually due, or all or part of the interest actually due, will not constitute such new contract with a sufficient consideration. There must be an actual intention by both parties to extend the time of payment to a definite time and an intention to pay and receive a consideration therefor.

At about the time of the maturity of the note in suit the principal maker notified the payee that he would like the same to run another year at the same rate of interest. The payee only desired interest on his note, and so notified the principal maker. On six or more different times a similar conversation was had between the payee and the principal maker, and the note continued and the payment of interest was made by the principal maker at about the end of each year. At about the time of the last payment of interest the principal maker notified the payee that he could pay one-half of the principal and

the interest. The payee expressed the wish that one-half should not be paid at that time. The payee was not bound to accept less than the whole amount, but at that time stated the interest would be reduced from eight per cent, as had theretofore existed, to seven. In *Crossman v. Wohlleben, supra*, it was held (p. 541): "A mere promise of indulgence on payment of interest at the rate named in the note, or at any other rate, is not binding without something to bind the debtor to pay interest for a given time. A payment of interest in advance would answer, and \* \* \* a promise by the principal debtor to keep the money a given time at a given rate of interest would be such a consideration as would support and make binding the promise by the creditor to extend the payment for a given time. It is essential, in all such cases, that both parties should be bound by the agreement, or that it should have mutuality. The record in this case fails to show specifically that the principal debtor at any time bound himself to keep the money and pay the interest upon it for any specified time, or that he ever paid interest in advance. The endorsements upon the note are presumed to have been made by the creditor, and may have been consented to by the principal debtor. These endorsements of the payment of interest fail to show any payment of interest in advance. None of these endorsements show a contract on the part of the debtor to keep the money for any given time. \* \* \* A mere promise made by a creditor to indulge the debtor for a given length of time upon the payment of interest does not bind him to such extension, because the payment of interest is already secured by the terms of the original note for any delay that may occur from any indulgence that might be given; and unless the debtor is also bound by the contract to retain the money for a given length of time, and to pay the interest for that period whether he retains the money that length of time or not, such promise by the creditor lacks consideration and is not binding upon either party."

Under the evidence in this record it does not appear there was ever a payment of interest in advance made as a consideration for the extension of time to a specified date, nor is there any evidence showing the principal debtor at any time bound himself to keep the money and pay interest for a specified time. The evidence shows a mere promise of indulgence by the payee towards the original maker, and no more interest was paid than what was substantially due at the time of the payment and at the rate mentioned in the note. There was no mutuality in the contract by which a collection could be made from the principal of interest to a specified time, and in the absence of such mutuality, and in the absence of a consideration for an extension of time, by which, if a suit were brought on the note, the principal could avoid a recovery before a specified date, there was not such an extension as would release the sureties.

It is contended by the appellees that it is a valuable right to have money placed on interest and a valuable right to have the privilege of getting rid of the payment of interest by discharging the principal, and *McComb v. Kitteridge*, 14 Ohio, 351, is cited to sustain the contention. Unless, however, both parties are bound by the contract of extension there is no consideration for the agreement of the creditor to extend the time of payment. There is no evidence in this record showing such an extension of time for a specified period and for a specified consideration as was mutually binding on both parties. There is in this record no evidence which would preclude the creditor from bringing suit at any time on the note and having a recovery, by reason of anything shown in the way of an extension of time for a consideration.

It was error in the Appellate Court to reverse the decree of the circuit court. The judgment of the Appellate Court for the Third District is reversed and the decree of the circuit court of Jersey county is affirmed.

*Judgment reversed.*

## THE BREWER &amp; HOFMANN BREWING COMPANY

v.

JOHN T. BODDIE.

*Opinion filed October 13, 1899.*

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e107a 859

1. WORDS AND PHRASES—*word "saloon" does not necessarily mean a dram-shop.* The word "saloon" may or may not mean a place for the retail of spirituous liquors.

2. CORPORATIONS—*when lease for saloon is not ultra vires corporation.* A lease of premises to be occupied for "saloon" purposes, without specifying what shall be sold there, is not *ultra vires* a corporation authorized to manufacture and sell soda water, although it has no power to rent a saloon for the sale of intoxicating liquors.

3. LANDLORD AND TENANT—*when lease for "saloon" is not void so as to excuse payment of rent.* A lease of premises for "saloon" purposes, entered into by a corporation authorized to manufacture and sell soda water, is not void so as to preclude the collection of rent, although the corporation sells intoxicating liquors on the premises in excess of its chartered powers.

*Brewer & Hofmann Brewing Co. v. Boddie*, 80 Ill. App. 353, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

EDWARD MAHER, and ROBERT F. KOLB, for appellant.

LOESCH BROS. & HOWELL, and FREDERICK PEAKE, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

The appellant is a corporation organized under the laws of this State "to carry on a general brewing and malting business and manufacture and sell soda waters in the city of Chicago." On February 3, 1893, it entered into a written lease from appellee to it and others for a period of five years, by which it agreed to pay appellee the rent stipulated in the lease, in monthly payments of \$500 each, for the premises, which by the terms of the

lease were "to be occupied for saloon and no other purpose whatever." The evidence showed that for a part of the term appellant occupied and used the premises as a restaurant and general saloon, in which it sold whisky, cigars, beer, cider, soda water and pop. It then vacated the premises and offered to surrender them to appellee, and, having paid the accrued rent, refused thereafter to pay the rent subsequently accruing from month to month under the lease. This suit was then brought to recover a part of such rent.

The principal defense set up by plea and relied on at the trial and on this appeal was and is, that the lease was *ultra vires* the corporation; that the lease contract was a continuing one, and was unperformed and unexecuted as to the rent sued for, and that appellant was not bound by it. No other question has been presented here by either side. The trial court refused all the instructions requested on either side, and, after overruling the motion for a new trial, gave judgment on the verdict of the jury against appellant for the rent sued for, which judgment the Appellate Court has on writ of error affirmed.

Had appellant confined the use of the premises to the sale of soda water it would certainly have been acting within the scope of its charter, but it had no power to engage in the business of retailing intoxicating liquors or to rent and carry on a liquor saloon. We cannot, however, say, as a matter of law, that the word "saloon," as used in the lease, meant a place where intoxicating liquors were to be sold and not a place for the sale of soda water. There may be many different kinds of saloons, and the lease is wholly silent as to the kind of saloon for which the premises were to be used. A saloon may or may not mean a place for the retail of spirituous liquors. (*Snow v. State*, 50 Ark. 561; *Springfield v. State*, 13 S. W. Rep. 752; *State v. Mansker*, 36 Tex. 365.) Places for the retail of spirituous liquors are in the statutes of this State generally termed dram-shops or tippling houses.

The premises were used by appellant partly for purposes permissible by its charter and partly for purposes not so permissible. If appellant had covenanted to carry on in the premises the business of a retail liquor dealer it would not have been bound by such covenant, for the reason that it had no power to engage in that business and consequently no power to bind itself to do so. But it had power, incidental to its express powers, to rent the premises as a place, or even a saloon, in which to sell its soda water, and if, in addition to the sale of soda water, it retailed intoxicating liquors and kept a dram-shop or tippling house, its lease contract with appellee was not thereby rendered void. Whether or not it would be liable to the State to forfeit its charter is a question not involved in this suit. The appellant would certainly not be permitted to say that because it had used the premises for a business which it had no power by its charter to carry on, its contract to pay rent is void and cannot be enforced against it. It had the power to rent the premises for its legitimate business, and could not avoid its contract by using the premises for other business not authorized by its charter. Thus, we have held that a corporation having power to borrow money can not evade payment on the ground that it expended the money in prosecuting a business which, though in itself not immoral or illegal, it had no authority to carry on, even though the lender knew the money was to be expended in such business. *Bradley v. Ballard*, 55 Ill. 413.

We are referred to *McNulta v. Corn Belt Bank*, 164 Ill. 427, and other authorities, as sustaining the proposition that so far as the contract remains executory the corporation may avail itself of the defense here relied upon. We cannot hold, however, upon the record before us, that the lease in question was *ultra vires* this corporation, and need not, therefore, consider whether it was executory or not.

We find no error, and must therefore affirm the judgment of the Appellate Court.

*Judgment affirmed.*

LUCIUS R. FINCH

v.

FRANK L. GALIGHER.

181 625  
215 157

*Opinion filed June 19, 1899—Rehearing denied October 6, 1899.*

1. PLEADING—*general demurrer reaches all objections to plea in abatement.* A general demurrer is sufficient to reach all objections to a plea in abatement, whether as to matters of form or substance.

2. SAME—*plea in abatement must answer all it purports to cover.* A plea in abatement to a suit on a note which merely recites what is alleged in a certain count of the declaration, without anything *dehors* the record, so far as such count is concerned, is demurrable.

3. SAME—*effect where plea in abatement and replication are both bad.* Where a plea in abatement and the replication thereto are both bad, a demurrer to the replication should be carried back to the plea in abatement but cannot go beyond it.

4. PARTNERSHIP—*when judgment against one partner on joint note does not release other.* By virtue of section 11 of the Practice act, (Rev. Stat. 1874, p. 776,) where a suit is begun in a foreign State against partners on their joint note and only one partner is served, the judgment against the latter does not merge the joint demand so as to bar a suit in this State against the partner not served, in the absence of satisfaction of the judgment.

CARTWRIGHT, C. J., does not fully concur in the opinion.

*Finch v. Galigher*, 71 Ill. App. 75, reversed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Alexander county; the Hon. JOSEPH P. ROBARTS, Judge, presiding.

Appellant brought suit to recover from appellee the amount of a promissory note assigned to appellant by the payees. The note was dated at New York, July 20, 1886, due six months after date, payable to the order of L. R. Finch & Sons, for \$4486.84, at the office of L. R. Finch & Sons, and was signed "Charles Galigher & Son." On December 30, 1893, the sheriff returned that he served Frank L. Galigher, and that Charles Galigher was not served by order of plaintiff's attorney. No declaration

was filed at the return term, and the cause was continued. On May 1, 1894, a declaration was filed complaining of Frank L. Galigher, impleaded with Charles Galigher, and averring they, as partners, under the firm name of Charles Galigher & Son, at New York, to-wit, in the county and State aforesaid, made and executed the note sued on, setting up the same and setting out the endorsement. On February 23 the defendant filed the following plea: "And the said Frank L. Galigher, by Green & Gilbert, his attorneys, comes and defends the wrong and injury, when, etc., and prays judgment of the said writ, because he says that the several supposed promises and undertakings in the said declaration mentioned, if any such were made by the said defendant, were, and each of them was, made by the said defendant jointly with one Charles Galigher, as partners, in and under the name and style of Charles Galigher & Son, and not by the said defendant alone, which said Charles Galigher is still living, to-wit, at the county of Alexander, aforesaid; and this he, the defendant, is ready to verify, wherefore, inasmuch as the said Charles Galigher is not named in the said writ together with the said defendant, he, the said defendant, prays judgment of the writ and that the same may be quashed," etc. To this plea a replication was filed, with caption, and in substance as follows:

"STATE OF ILLINOIS, } ss. *In the Circuit Court, May term,*  
"County of Alexander. } *A. D. 1895.*

"Lucius R. Finch *vs.* Frank L. Galigher.—Assumpsit.

"And the plaintiff saith that his said writ, by reason of anything by the said defendant in his said plea above alleged, ought not to be quashed, because he says that on the 22d day of November, 1892, in the Supreme Court in and for the county of New York, in the State of New York, at the November term thereof, 1892, in a certain action brought by the said plaintiff against the said Charles Galigher and the said defendant, upon the said several promises and undertakings in the said plea and

declaration mentioned, in which said action said Charles Galigher but not the said defendant was served with process, the said plaintiff recovered judgment against the said Charles Galigher for the full amount then and there due the said plaintiff, as by the record and proceedings thereof now remaining in the said Supreme Court will more fully appear. And the said plaintiff avers that when the said action was commenced and up to the time when said judgment was rendered, the said defendant, Frank L. Galigher, was without the State of New York and a non-resident thereof, so that process could not be served upon him in the said action; and this the said plaintiff is ready to verify by the record, wherefore he prays judgment if the said writ ought to be quashed, and that the said defendant may answer over," etc.

To this replication appellee demurred, and for special grounds averred said replication is not properly entitled in the proper court; that it improperly concludes with a verification by the record; that the conclusion is not in proper form, and that it is otherwise informal and insufficient. The demurrer was sustained, the writ quashed and judgment entered against the plaintiff for costs. He appealed, and assigned in the Appellate Court for the Fourth District the following errors: First, the court erred in sustaining the demurrer to the replication; second, in not carrying the demurrer back to the plea in abatement; third, the court erred in quashing the summons; and fourth, the court erred in rendering judgment for defendant and against the plaintiff. The judgment of the circuit court was affirmed. An appeal is prosecuted to this court, and errors assigned on the record of the Appellate Court for its affirmance of the judgment of the circuit court.

LANSDEN & LEEK, for appellant.

GREEN & GILBERT, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

The question presented on this record is whether the demurrer was properly sustained to the replication. The entire question as to the right of recovery by reason of the execution of the note by the firm, and the recovery against one member of that firm in the Supreme Court of New York for the county of New York, was presented by the count of the declaration filed in this case.

Appellant contends that the suit in New York having been brought against both partners and one not being served because he was a non-resident of and was not and had not been in that State so that he could be served, therefore a judgment against the partner summoned was not a discharge of appellee from liability on the note, and this being so, the assignee of the note had the right to bring this suit against the maker who was sued.

Section 11 of the Practice act provides: "When several joint debtors are sued, and any one or more of them shall not be served with process, the pendency of such suit or the recovery of a judgment against the parties served shall be no bar to a recovery on the original cause of action against such as are not served, in any suit which may be brought against them in any other place than in the county where the first suit is brought. This section shall not be so construed as to allow more than one satisfaction." The question presented by the record is whether this section applies to notes made by partners, and whether a judgment recovered against one member of the firm on a note so made by partners bars a recovery against a member of the firm not served.

Whilst many authorities may be found holding that in an original suit against partners all must be joined as defendants, or if brought against only one and a judgment against him is obtained the others are thereby discharged from liability, yet if suit is brought against joint or partnership debtors residing in the same or different States

and service is had against one, only, can it be said that such judgment is a bar on the same indebtedness in another suit brought in another State where the other defendant resided or might be found? The original suit on the note in this case was brought in the county of New York, State of New York, against both partners. Only one was served, and the other could not be served because he was a non-resident of the State. Section 11 of the Practice act above quoted, which provides that when several joint debtors are sued and any one or more of them shall not be served with process, the pendency of such suit or the recovery of a judgment against the parties served shall be no bar to a recovery on the original cause of action against such as are not served in any suit which may be brought against them in any other place than in the county where the first suit is brought, is applicable to the question here presented and must be held to govern and control it. It is clear that appellee was indebted to appellant for the amount of the note sued on, and the only question is whether the judgment against his partner in the Supreme Court of the county and State of New York is a bar to this proceeding.

The plea filed by the appellee in this case was in its commencement and conclusion a plea in abatement. The demurrer to the replication presents the question whether it should have been carried back to the plea. The plea does not answer the declaration. The allegation of the first and third counts of the amended declaration is: "For that whereas the said defendant and one Charles Galigher, partners, etc., on the 20th day of July, 1886, at New York, that is to say, at the county and State aforesaid, under the said firm name and style, made their certain other promissory note in writing bearing date the day and year last aforesaid, and thereby then and there jointly and severally promised to pay, etc., by means whereof the said defendant then and there became liable, etc., and being so liable the said defendant, in considera-

tion, undertook," etc. This is attempted to be answered by the plea by saying, "because he says the several supposed promises and undertakings in the said declaration mentioned, if any such were made by the said defendant, were, and each of them was, made by the said defendant jointly with one Charles Galigher, as partners, in and under the name and style of Charles Galigher & Son, and not by the said defendant alone." The first and third counts allege a joint and several promise, which is sought to be avoided by the plea which seeks to set up in bar that the promises were joint promises, and the plea therefore does not answer the declaration.

Pleas in abatement, like other pleas, must answer the whole declaration or all they purport to answer. All that is alleged in the plea is alleged in the amended first and third counts of the declaration, that a demurrer would, as a matter of law, determine the sufficiency of the averment to the same extent as presented by the plea, if the same were proven as alleged therein. The replication to the plea in effect only recites what is in the plea and in the third count of the declaration. 1 Chitty's Pl. 459; 1 Tidd's Pr. 641; 2 Sanders, 210c; *Herries v. Jamieson*, 5 T. R. 553; *Dunlap v. Turner*, 64 Ill. 47; *Diblee v. Davison*, 25 id. 486; *Moore v. Rogers*, 19 id. 347; *People v. Harrison*, 82 id. 84; 1 Greenleaf on Evidence, 589a.

The plea, by reason of being a recital of what is contained in the first and third counts as amended, was obnoxious to a demurrer. A general demurrer is sufficient to reach all objections to pleas in abatement, whether of matters of form or of substance. *Buddle v. Wilson*, 6 T. R. 370; *Clifford v. Cony*, 1 Mass. 469; *Shaw v. Dutcher*, 19 Wend. 216; 1 Chitty's Pl. 465; 1 Tidd's Pr. 638, 695.

The plea did not aver any matter *dehors* the record, so far as the first and third counts are concerned, and hence the sufficiency of those counts could have been presented by demurrer. *Saunders*, 291c, note 4; *Cummings v. People*, 50 Ill. 132; *Sinsheimer v. Skinner Manf. Co.* 165 id. 116.

The replication being a recital of what was contained in the counts and substantially of what was stated in the plea, was bad, and a demurrer thereto could properly have been sustained, but the demurrer should have been carried back to the plea. The plea, however, being in abatement, the demurrer could not go beyond the plea. It could make no difference because the plea was to the writ. *Ryan v. May*, 14 Ill. 49; 1 Chitty's Pl. 466; *Shaw v. Dutcher*, 19 Wend. 216; Stephens' Pl. 145.

Under the averment of the first and third counts of the declaration and under section 11 of the Practice act the taking of judgment in New York against Charles Galigher in the action in which he, only, was served and the appellee herein was not served because not in nor a resident of that State, did not operate as a merger of the joint demand or release the appellee from liability on the note. *Shirley v. Shattuck*, 54 Mass. 256; *Tappan v. Bruen*, 5 id. 193; *Dennet v. Chick*, 2 Greenl. 191; *Rand v. Nutter*, 56 Me. 339; *Cox v. Maddox*, 72 Ind. 206; *Merriam v. Barker*, 121 id. 74; *B. & P. L. Co. v. W. & P. B. & M. Co.* 76 Fed. Rep. 10; *Freeman on Judgments*, sec. 284.

The statute of Massachusetts is very similar to the statute of this State on the question of the liability of joint obligors, and in *Shirley v. Shattuck*, 54 Mass. 256, it was held: "The first question is, whether a judgment against one of two joint obligors is a bar to an action of debt on the original obligation against another joint obligor. It seems to be useless to examine and review the numerous authorities cited in the argument, because we think the case is within the provisions of the Revised Statutes, intended, apparently, to remove doubts, fix the law upon the subject and do away the effect of those authorities, so far as it is in conflict with them. By Rev. Stat. chap. 92, sec. 12, it is provided that in a suit against several on a joint contract, if one only is legally served the suit may proceed to judgment against such one without further proceedings against the others; and by sec-

tion 13, if such judgment remain unsatisfied an action on the same contract may be afterwards maintained against any of the other joint contractors as if the contract had been joint and several. This is equivalent to an express enactment that such prior judgment against one shall not be a bar to an original action against another joint obligor. It is a statute severance, and analogous to the case where one joint obligor dies, in which a separate suit may be maintained against the survivor. If, therefore, the judgment relied on had been a judgment in Massachusetts the statute would have been an answer to the objection; and the court are of opinion that a judgment in New Hampshire, which by courtesy is allowed to have, in most respects, the force and effect of a domestic judgment, can have no greater effect in barring an action in this commonwealth. The court are of opinion that upon this point the decision of the court of common pleas was right."

The slight difference in the statute does not affect the principle involved in that case, and it is applicable to the question now before the court. The whole defense is based on the merger of the obligation evidenced by the note by reason of the New York judgment, and as we hold that such judgment is no bar to a suit against the defendant not served in New York, and under our statute an action may be brought against him in this State where there has been no satisfaction of the New York judgment, the judgment of the Appellate Court for the Fourth District and the judgment of the circuit court of Alexander county are each reversed and the cause is remanded to the circuit court of Alexander county, with directions to proceed in accordance with what is here said.

*Reversed and remanded.*

Mr. CHIEF JUSTICE CARTWRIGHT: I concur in the judgment in this case but not in all that is said in the above opinion.

IDA E. MACK

v.

ALEXANDER MCINTOSH *et al.*

181	688
206	845

*Opinion filed October 19, 1899.*

1. VENDOR AND PURCHASER—*vendee cannot urge an objection to title which he has purposely created.* A vendee cannot urge, as an objection to the vendor's title, a mechanic's lien which he has induced a contractor to file for the purpose of putting a cloud upon the title and to embarrass the vendor in carrying out the agreed sale.

2. SPECIFIC PERFORMANCE—*equity will not permit vendee to take advantage of his bad faith.* A court of equity will not decree specific performance of a contract for the sale of real estate in favor of the purchaser or his assignee, where the failure to perform was due to an objection to the title urged in bad faith by the purchaser.

3. SAME—*when equity will not retain bill to assess damages.* A bill for the specific performance of a contract for the sale of real estate will not be retained for the assessment of damages, but will be dismissed and complainant left to his legal remedy, where he knew, when he brought the suit, of the vendor's incapacity to perform the contract because he had conveyed the property to a *bona fide* purchaser.

4. CONVEYANCES—*copy of contract is not entitled to be recorded.* The mere copy of a contract cannot be recorded, as it has no legal authority and is not an instrument of which the law takes notice.

5. NOTICE—*record of unsigned copy of contract not constructive notice.* The record of an unsigned copy of a contract to sell land will not operate as notice to one who in good faith accepts a deed from the vendor or deprive him of the character of *bona fide* purchaser.

6. SAME—*what not such possession as constitutes notice.* That a person has some hardware stored in the cellar of a building does not, in the absence of anything to indicate his ownership of it, constitute such possession of the premises as will operate as notice, to a purchaser, of his equities.

7. SAME—*when knowledge of agent cannot be imputed to principal.* A *bona fide* purchaser of land from a vendor, who had theretofore entered into a contract of sale with another person, is not chargeable with notice of the contract because the attorney at law who acted as his agent in purchasing the property had acquired knowledge of such contract while acting as the legal adviser of the vendor.

WRIT OF ERROR to the Superior Court of Cook county;  
the Hon. W. G. EWING, Judge, presiding.

This is a bill, filed on May 27, 1892, by Ida E. Mack, plaintiff in error, against Alexander McIntosh and Francis O. Matthiessen, defendants in error, and one Charles P. Packer, for the specific performance of a contract for the sale of real estate, situated in Chicago. Default was entered against Packer for want of an answer. Answers were filed by the defendants in error, McIntosh and Matthiessen. Replications were filed to the answers. Testimony was taken in open court before the chancellor. On April 3, 1894, a hearing was had upon the evidence taken, and a decree was entered, dismissing the bill at the costs of the complainant for want of equity. The present writ of error is sued out for the purpose of reviewing the decree so entered.

The contract, the specific performance of which is sought to be enforced by the bill, bears date May 6, 1890, but appears not to have been executed until May 8, 1890. The contract for the sale of the premises in question, so executed on May 8, 1890, was made between the defendant in error, Alexander McIntosh, as vendor, and Charles P. Packer, as vendee. On April 30, 1891, Packer sold and assigned all his interest in the contract to his sister, Ida E. Mack, plaintiff in error, who filed the present bill, as such assignee of the contract. On July 23, 1890, Alexander McIntosh and his wife executed a deed of that date to Francis O. Matthiessen, conveying the premises in question for the expressed consideration of \$70,000.00, which deed was recorded on July 23, 1890.

By the terms of the contract in question, McIntosh agreed to sell, and Packer agreed to purchase, the said premises at the price of \$67,000.00, subject to existing leases and subject to an encumbrance thereon of \$30,000.00, which Packer assumed and agreed to pay. The contract further provided, that Packer had paid \$3000.00, as earnest money to be applied on the purchase when consummated, and had agreed to pay "within ten days after the title has been examined and found good," the

further sum of \$12,000.00, provided a good and sufficient warranty deed, conveying a good title, should then be ready for delivery. The contract also provided, that the balance of the purchase money, to-wit, \$22,000.00, should be payable in three years, and be secured by note and mortgage or trust deed upon the property. By the terms of the contract, a complete abstract of title, or merchantable copy, was to be furnished by the seller within a reasonable time, with a continuation thereof brought down to cover the date, at which it was made; and the contract provides, that, "in case the title upon examination is found materially defective within ten days after said abstract is furnished, then the material defects shall be cured within sixty days after written notice." The contract also provides that, should the purchaser fail to perform the contract promptly on his part in the manner and at the time therein specified, the earnest money paid as above shall, at the option of the vendor, be forfeited as liquidated damages, and the contract shall be, and become, null and void. Time was made of the essence of the contract and all the conditions thereof; and, by its terms the sale was to be "consummated within ten days after delivery of abstract to buyer, showing good title to same." By the terms of the contract, the contract itself and the earnest money were to be held by the parties, each a copy, for their mutual benefit; and the contract and the earnest money, amounting to \$3000.00, were "to remain in escrow with J. E. Kimball pending closing of this sale."

Packer was, at the time of the making of the contract, president of the Park National Bank of Chicago. The earnest money was not paid in cash, but a check on the Park National Bank, dated May 8, 1890, for the sum of \$3000.00, signed by Charles P. Packer, and payable to the order of Alexander McIntosh,—and across the face of which were written the words, "Accepted, payable through Chicago clearing house, May 8, 1890," these words

being signed by the Park National Bank,—was deposited in escrow with Kimball to be held by him according to the terms of the contract.

The abstract of title, brought down to and including May 7, 1890, was furnished to the attorney of Packer by McIntosh on May 15, 1890. The attorney of Packer completed his examination of the title on May 24, 1890, and, on the evening of the latter day, submitted to McIntosh his written opinion in regard to the title, stating various objections thereto. On May 26, 1890, McIntosh, and his attorney, and certain other parties, made a tender of a deed and of certain papers intended to cure the objections to the title, to Packer at his bank. Packer refused to accept the deed, or to pay the \$12,000.00, or to execute the notes and mortgage for \$22,000.00, upon the ground that the title was not good, and that the objections thereto, made by his attorney, had not been properly cured. On May 27, 1890, McIntosh served a written notice upon Packer, that he had elected to declare the contract forfeited, and had exercised his option to declare the earnest money forfeited to him as liquidated damages.

Shortly after these transactions, and in June or July, 1890, the Park National Bank failed. After the failure of the bank, and some time in July, 1890, Kimball delivered the check to McIntosh. Some time thereafter the check was paid to McIntosh by the receiver of the bank.

DEFREES, BRACE & RITTER, for plaintiff in error:

The remedy by bill in equity seeking specific performance is the natural, usual and proper remedy for breach of contract to sell and convey real estate, and, if the contract is fair, reasonable and definite in its terms, such relief goes as a matter of course. 22 Am. & Eng. Ency. of Law, 941; *Young v. Daniels*, 2 Iowa, 126; *Throckmorton v. Davidson*, 68 id. 643; *Fowler v. Marshall*, 29 Kan. 665; *Popplein v. Foley*, 61 Md. 381; *Shriver v. Seiss*, 49 id. 384; *Aston v. Robinson*, 49 Miss. 348; *St. Paul Division v. Brown*,

9 Minn. 157; *Johnson v. Dodge*, 17 Ill. 433; *Lyman v. Gedney*, 114 id. 388.

An assignee of a contract for the sale of real estate has the same rights and remedies for the enforcement thereof as his assignor. *Wass v. Mugridge*, 128 Mass. 394; *Love v. Sortwell*, 124 id. 446; *Gannett v. Albree*, 103 id. 372; *Robbins v. McKnight*, 5 N. J. Eq. 642; *Ewins v. Gordon*, 49 N. H. 444; *Ricker v. Moore*, 77 Me. 292.

If the grantor of the vendee took with notice of the contract he is bound thereby and acquires no greater right than his vendor, and the contract may be enforced against him as well as the vendor. *Hunter v. Bales*, 24 Ind. 299; *Wilson v. Emig*, 44 Kan. 125; *Lovering v. Fogg*, 18 Pick. 540; *Hayward v. Cain*, 110 Mass. 273; *Gummett v. Gingrass*, 77 Mich. 369; *Young v. Young*, 45 N. J. Eq. 27; *Laverty v. Moore*, 33 N. Y. 658; *Otis v. Payne*, 86 Tenn. 668.

The agent of the vendor's grantees had notice of the contract in question, and such notice is notice to his principal. *Ventres v. Cobb*, 105 Ill. 33; *Whitney v. Burr*, 115 id. 289; *Jackson v. Horton*, 126 id. 566.

The purchaser was put on inquiry by the recording of the unsigned copy of the contract in question, and could have had knowledge of the facts by ordinary diligence, and consequently is bound whether he had actual knowledge or not. *Doyle v. Teas*, 4 Scam. 202; *Stokes v. Riley*, 121 Ill. 166; *Robbins v. Moore*, 129 id. 30; *Anthony v. Wheeler*, 130 id. 128.

A purchaser who has bargained for a good title can not be compelled to take one which is even subject to suspicion. It must be free from reasonable doubt; a title to which no reasonable man would object; one which a prudent man would not hesitate to purchase at a full market price. *Brown v. Cannon*, 5 Gilm. 174; *Mead v. Altgeld*, 136 Ill. 298; *Bishop v. Newton*, 20 id. 175; *Lancaster v. Roberts*, 144 id. 213; *Wallace v. McLaughlin*, 57 id. 53; *Hale v. Cravener*, 128 id. 408; *Gradle v. Warner*, 140 id. 123.

PRUSSING & McCULLOCH, for defendants in error:

To entitle a party to relief he must come with clean hands and a cause that appeals to equity for relief. *Doyle v. Teas*, 4 Scam. 265; *Tamm v. Lavalle*, 92 Ill. 270; *Kelly v. Kendall*, 118 id. 654; 1 Pomeroy's Eq. Jur. 432.

No one should be permitted to take advantage of his own wrong. *Kassing v. Durand*, 41 Ill. App. 104; *People v. Holden*, 82 Ill. 101; Broom's Legal Maxims, 279; *Dunaway v. Robertson*, 95 Ill. 426.

He who prevents a thing being done shall not avail himself of the non-performance he has occasioned. *Bass v. Gilliland*, 5 Ala. 761; Broom's Legal Maxims, 282; Fry on Specific Per. p. 282, sec. 639; *People v. Holden*, 82 Ill. 102.

Where the purchaser is not entitled to specific performance of the contract his assignee is in no better position. *Rose v. Swann*, 56 Ill. 37.

A bill for specific performance of a contract is addressed to the sound legal discretion of the court, and relief will not be granted as matter of course. *Frisby v. Ballance*, 4 Scam. 287; *Maltby v. Thews*, 171 Ill. 264; *Carroll v. Drury*, 170 id. 578; *Crandall v. Willig*, 166 id. 239; *Leonard v. Crane*, 147 id. 52; *McDonald v. Minnick*, id. 651; *Morse v. Seibold*, id. 318; *Sloniger v. Sloniger*, 161 id. 278; *Dingleman v. Gilbert*, 140 id. 597; *Harrison v. Polar Star Lodge*, 116 id. 286; *Railroad Co. v. Reno*, 113 id. 43; *Fish v. Leser*, 69 id. 395.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

*First*—We do not deem it necessary to enter into any detailed discussion of the terms of the contract, made between McIntosh and Packer. They appear to have been associated together in the ownership of the premises in question, and in the erection thereon of an apartment building or building of flats, known as the "Alexandra" flats. After the contract for the sale of the premises by McIntosh to Packer was entered into, and, on May 23, 1890, Dowdle & McWhirter, a firm composed of John

Dowdle and James McWhirter, filed a mechanic's lien notice in the office of the clerk of the circuit court of Cook county for \$4601.07, claimed to be due to them, as stone contractors. Dowdle & McWhirter had furnished the stone, used in the erection of the building upon the premises. The mechanic's lien, notice of which was thus filed on May 23, 1890, was not minuted upon the abstract of title, which had been furnished to Packer's attorney, but had come to his knowledge before his examination of the abstract was finished, and, in his opinion in regard to the title, he referred to this lien as an existing encumbrance upon the property, and made it the basis of an objection to the title.

The proof tends to show, that the building upon the premises was completed in April or May, 1889, and that, on September 17, 1889, a settlement had been had between McIntosh on the one side, and Dowdle & McWhirter on the other, by the terms of which Dowdle & McWhirter waived their right to a lien upon the building, and accepted a note in payment of the balance due them. On May 26, 1890, when the deed was tendered by McIntosh to Packer, a written waiver of lien, signed by Dowdle & McWhirter on September 17, 1889, and other papers, tending to show that nothing was due to Dowdle & McWhirter, were exhibited and tendered by McIntosh to Packer. We stop not to consider, whether or not, by the terms of the contract of sale between McIntosh and Packer, McIntosh was bound to furnish an abstract, showing upon its face a release of this alleged mechanic's lien. Such consideration is unnecessary in view of what is stated hereafter.

We are satisfied from the evidence, that this notice of a mechanic's lien was filed by Dowdle & McWhirter at the instigation of Packer himself. The name of the building of flats, "Alexandra," had not been carved, as was originally intended, over the entrance thereto. On May 8, 1890, the very day on which the contract of sale was

signed, Packer induced McIntosh to sign a written order to Dowdle & McWhirter, directing them to carve the letters, "Alexandra," over the entrance to the building. This written order stated, that Dowdle & McWhirter had agreed to put on these letters, but had failed to do so, and that they had been settled with and paid therefor already. The theory, upon which the mechanic's lien notice was filed, appears to have been that, by the cutting of these letters, which took place between May 8 and May 23, 1890, the performance of the contract for the stone work would be extended up to the latter date. Packer was present with Dowdle & McWhirter during a part of the time when they were carving these letters in the stone. Admissions made by Packer, and other circumstances developed by the testimony, prove that the whole transaction in regard to the filing of the mechanic's lien was brought about by Packer for the purpose of putting a cloud upon the title, so as to embarrass McIntosh in carrying out the sale of the property.

In view of the manner, in which the lien was thus put upon the property, Packer was not, of course, warranted in urging the presence of such lien upon the records as an objection to the title. For the same reason, he can not come into a court of equity to ask for a specific performance of the contract of sale. The contract, made on May 6 or May 8, 1890, was assigned to the plaintiff in error on April 30, 1891. If Packer, the purchaser, is not entitled to a specific performance of the contract, the plaintiff in error, his assignee, is in no better position. (*Rose v. Swann*, 56 Ill. 87). The present bill for specific performance was not filed by the plaintiff in error until May 27, 1892, more than a year after the contract was assigned to her. Where an objection to a title is urged in bad faith, neither the purchaser, nor his assignee, can be excused for the delay occasioned in the performance of the contract. (*Hoyt v. Tuxbury*, 70 Ill. 381). The conclusion is irresistible that, at the time Packer urged his

objection to the title, based upon the existence of this lien, he knew of its real character. A bill for the specific performance of a contract is addressed to the sound legal discretion of the court, and relief will not be granted as a matter of course. (*Maltby v. Thews*, 171 Ill. 264). To entitle a party to relief in a court of equity, he must come with clean hands, and with a cause that appeals to equity for relief. (*Tamm v. Lavalle*, 92 Ill. 263).

We are of the opinion, for the reasons above stated, that plaintiff in error was not entitled to a specific performance of the contract. To allow her to have it would be to allow her to take advantage of her own wrong, or of that of her assignor.

*Second*—It is urged, however, by the plaintiff in error that, even if the specific performance of the contract be not granted, yet that she should have a decree for the amount of the earnest money, to-wit, the sum of \$3000.00, and interest thereon, as compensation, and that the decree for such amount should be made a lien upon the premises. This contention cannot be sustained under the facts of this case, but plaintiff in error must be left to her remedy at law, if she has any. We express no opinion upon the question, whether or not McIntosh had a right to rescind and forfeit the contract, and retain the earnest money. We simply hold that, in this proceeding, the plaintiff in error is not entitled to a decree for the amount of the earnest money, which shall be a lien upon the property, for the reasons hereinafter stated. On July 23, 1890, after Packer had refused to carry out the contract, and after McIntosh had tendered a deed of the premises and served notice of forfeiture, McIntosh sold the premises to the defendant in error, Francis O. Matthiessen, for the sum of \$70,000.00, and executed to him a deed therefor, which was recorded on the day of its date. Counsel for plaintiff in error make no claim in their brief, that Matthiessen did not purchase the property in good faith and for a valuable consideration. They

claim, however, that Matthiessen had notice, or, under the law, was chargeable with notice of the contract made between McIntosh and Packer, and that, therefore, he holds the property subject to the same equities in favor of Packer or his assignee, as would exist in case the title still remained in McIntosh. This certainly would not be so, if Matthiessen had no notice, or is not chargeable with notice, of the contract between McIntosh and Packer.

The allegations of the bill, and the testimony in the case, show that the plaintiff in error knew, before she filed the present bill, that McIntosh, the vendor in the contract, had parted with the title to the land. The rule is, that, where the vendor's incapacity to perform the contract, though caused by his own act, as by his conveyance to a *bona fide* purchaser, is known to the complainant or vendee at the time of bringing suit, the bill will not be retained for the assessment of damages, but will be dismissed, leaving the complainant to his or her legal remedy for the recovery of said damages. (*Saur v. Ferris*, 145 Ill. 115; *Doan v. Mauzey*, 33 id. 227; *Stickney v. Goudy*, 132 id. 213; *Hurlbut v. Kantzler*, 112 id. 482; *Sellers v. Greer*, 172 id. 549). Of course, the rule that a bill for specific performance will not be retained to assess damages for a failure to perform the contract where the complainant knew, when he filed the bill, that the vendor had parted with the title to the property, is subject to the condition, that the vendor has parted with the title to a *bona fide* purchaser, that is, to a purchaser without notice of the equities of the party filing the bill.

It is claimed by the plaintiff in error, that Matthiessen had notice, because, before his purchase, Packer had put on record an unsigned copy of the contract between himself and McIntosh. The recording of such unsigned copy could not operate as notice to Matthiessen, for the reason that it was not such an instrument as was entitled to be recorded. The record of an instrument, not entitled by law to be recorded, is of no avail as notice. (*St. John*

v. *Conger*, 40 Ill. 535). The mere copy of a contract is not entitled to be recorded, as it has no legal authority, and is not an instrument of which the law can take any notice. The original alone is entitled to be recorded. (*Lane v. Lesser*, 135 Ill. 567; *Mullanphy Savings Bank v. Schott*, id. 655). Surely, if the copy of an executed contract does not operate as notice when recorded, the copy of an unsigned contract cannot operate as such notice.

It is claimed, however, that Packer had such possession of the premises, as operated as notice to Matthiessen. The proof does not sustain this contention. Packer owned some hardware, which was stored in the cellar under the sidewalk in front of the building, but there was nothing to indicate to Matthiessen that this hardware belonged to Packer, nor did it constitute such possession as would operate as notice. Tenants, who occupied the building, were tenants of McIntosh, and the janitor, who had control of the building, was an employe of McIntosh. After an examination of the evidence, we are satisfied that all the *indicia* of possession pointed to McIntosh, and not to Packer, as the owner of the property.

It is said, however, that Eugene E. Prussing was the agent of Matthiessen in the purchase of the property, and that, inasmuch as Prussing had been the attorney of McIntosh, and had notice of the contract between McIntosh and Packer, and of the rights of Packer thereunder, Matthiessen was chargeable with notice through the notice thus possessed by his agent or attorney. It must be remembered that Prussing was an attorney at law, and whatever notice he acquired while acting for McIntosh, he acquired as the latter's attorney. The rule, that, if the agent, at the time of the purchase has knowledge of any prior lien or contract or equity affecting the property, his principal is chargeable with such knowledge, is subject to the qualifications, that the knowledge of the agent is present to his mind at the time of making the purchase for his principal, and that the agent is at

liberty to communicate his knowledge to his principal, and that it is his duty to do so. (*Williams v. Tatnall*, 29 Ill. 553; *Snyder v. Partridge*, 138 id. 173; *The Distilled Spirits*, 11 Wall. 356; *Burton v. Perry*, 146 Ill. 71). When the knowledge of the agent has been acquired confidentially as attorney for a former client in a prior transaction, the reason of the rule, that the principal is bound by the knowledge of his agent, ceases. In such case, the agent cannot be expected to do that which would involve a breach of professional confidence, and his principal ought not to be bound by his agent's secret and confidential information. (*The Distilled Spirits, supra*). In the present case, Matthiessen would not be affected by the notice of his agent, which the latter acquired confidentially as the attorney for McIntosh. We are, therefore, of the opinion that Matthiessen cannot be chargeable with such notice, as Prussing had, under the circumstances shown by this record.

It must be held, therefore, that Matthiessen was a *bona fide* purchaser of the property without legal notice of any rights on the part of Packer, or his assignee. This being so, the present bill cannot be retained for the purpose of entering a decree for compensation, which shall be a lien on the property.

We find no substantial error in the record, and accordingly the decree of the superior court is affirmed.

*Decree affirmed.*

# INDEX.

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ACCIDENT INSURANCE.—See INSURANCE.

	PAGE.
<b>ACCRETIONS.</b>	
title to accretions may be acquired by adverse possession of adjoining land upon which taxes are paid under claim and color of title.....	426
a bar forming in a river so as to connect with an island is an accretion to the latter although the connecting land is sometimes submerged.....	426
<b>ACTIONS AND DEFENSES.</b>	
to maintain a bill to remove cloud from title complainant must allege and prove either that he is in possession or that the property is unoccupied.....	149
a trespasser cannot defend an ejectment suit by setting up an outstanding title in a stranger.....	154
facts under which ejectment may be maintained.....	154
when assumpsit lies for money had and received.....	173
right of stranger, under section 132 of the Criminal Code, to sue for treble sum lost in gaming if loser does not sue, extends to gambling in grain options .....	199
severity of penalty imposed by statute against gambling furnishes no reason why it should not be enforced.....	199
city cannot sue in its own name on contract to locate head office of corporation in the city in consideration of dona- tions by its citizens.....	215
<i>mandamus</i> will lie to enforce payment of a claim by a san- itary district only when the claim is ascertained to be due.	334
<i>mandamus</i> will not lie to compel sanitary district to pay a claim ordered paid by board on execution of receipt in full, in absence of offer to perform the condition.....	334
in replevin against mortgagee, latter may show in defense that probable cause existed for believing the debt in- secure before he took possession of the chattels.....	449
in <i>quo warranto</i> to test title of respondent to office it is im- material whether any other person has title to the office.	460
owner of goods may, after demand, maintain trover against an officer for the conversion of goods taken on execution against a third person. ....	564

	PAGE
ADVERSE POSSESSION.—See POSSESSION.	
title to accretions may be acquired by adverse possession of adjoining land upon which taxes are paid under claim and color of title.....	426
possession of part of tract under color of title is possession of the entire tract described in the color relied upon....	426
possession of a dwelling house and land by a widow under her statutory right is not adverse to the heirs.....	529
AFFIDAVITS.—See OATH.	
affidavit of service does not confer jurisdiction when sworn to before foreign notary, whose authority to administer oaths is not made to appear.....	129
objection to an amendable defect in an attachment affidavit cannot be first raised on appeal.....	582
when statement of non-residence of corporation in attachment affidavit is sufficient.....	582
AGENCY.—See PRINCIPAL AND AGENT.	
ALIENS.	
one cannot claim estate of illegitimate as next of kin to mother if compelled to trace kinship through alien blood.	504
provisions of Alien act of 1887 apply to the estates of illegitimates as well as legitimates..	504
Alien act of 1887 does not apply to rights in property which have vested by way of escheat prior to its passage.....	505
AMENDMENT.	
matters in confession and avoidance of a special defense set up by plea should be made by replication, and not by amendment of the declaration.....	132
when court, on motion in arrest, may permit plaintiff to amend declaration by adding, as defendants, names of new parties who appeared and defended the suit.....	154
when amendment to be inserted in each count of a declaration sufficiently indicates the part of the declaration to be amended.....	411
ANCIENT DOCUMENTS.	
deeds more than thirty years old at time of trial are "ancient documents," although less than such age when the suit was begun.....	529
"ancient deed" coming from proper custody is admissible in evidence without proof of execution.....	529
existence of valid power of attorney will be presumed in favor of an "ancient deed" which purports to have been executed by an attorney in fact.....	529

	PAGE.
<b>ANNEXATION.</b>	
an annexation proceeding begun after filing of petition for an election to organize the territory affected into a village is illegal and void .....	315
<b>APPEALS AND ERRORS.</b>	
omission from instruction of essential element of recovery will not reverse if other instructions include such element and require its presence.....	9
instruction barring plaintiff's recovery if he "did <i>any</i> careless or negligent act which materially contributed to his injury" is properly refused.....	10
rule that chancellor's facilities for passing on evidence are better than those of a court of review does not apply to depositions.....	22
under rule 15 of Supreme Court alleged error or ground for reversal cannot be first urged in reply brief.....	31
mixed questions of law and fact in suits at law are settled by the judgment of the Appellate Court.....	31
instruction that jury may consider interest of a specified witness as bearing on his credibility is properly refused where other interested witnesses testified .....	116.
when refusal of instruction concerning effect of interest of witness upon his credibility cannot be complained of....	116
when assumption of question of fact by instruction is not ground for reversal.....	116
whether one prosecuted for violating an anti-peddling ordinance is "an itinerant merchant or a transient vendor of merchandise" is settled in the Appellate Court.....	151
when error in modifying instruction is not prejudicial....	158
errors not contributing to the verdict are not reversible...	158
filings authenticated copy of judgment or decree appealed from does not satisfy requirement that an authenticated copy of record shall be filed before second day of term...	162
court cannot permit complete record to be filed after second day of term unless what purports to be a transcript of the record has been previously filed.....	162
a bill of exceptions cannot be taken to review a judgment of the Appellate Court made in the exercise of its jurisdiction as a court of error.....	162
appeal is properly dismissed if transcript of record, or what purports to be a transcript, is not filed in time.....	162
a proposition asked to be held as the law of the case is properly refused when it ignores part of the evidence.....	173
a proposition of law not applicable to the facts as found by the court is properly refused.....	173
when giving of instruction ignoring matters of defense is not ground for reversal.....	206

APPEALS AND ERRORS.— <i>Continued.</i>	PAGE.
whether a deceased member of a benefit society was in good standing is a question of fact settled by the judgment of the Appellate Court.....	206
when denial of motion for change of venue is not reviewable on appeal.....	215
amount of condemnation verdict will not be disturbed on appeal, where the jury viewed the premises and the verdict is within the range of evidence.....	243
court's refusal to sustain objection to improper question will not reverse where one question was not answered and a harmless reply made to the other.....	243
giving of instruction which could not enlighten jury will not reverse if it is of such a character as could not have affected the verdict.....	243
jury are presumed to consider instructions as a whole, and to notice the qualification which one makes on another..	243
the chancellor's findings of fact are presumed sustained by proof in the absence of a certificate of evidence.....	249
a decree granting affirmative relief must be justified by the evidence in the record or by the specific recitals of fact in the decree..	249
objection to sufficiency of foundation laid for introduction of deed records cannot be first raised on appeal.....	266
when admission of improper evidence to impeach plaintiff's witness will work reversal.....	324
an order to give bond for costs, for failure to comply with which the suit is dismissed, is a final order, from which an appeal may be taken.....	331
refusal to permit complainant to prosecute as a poor person is not error, where affidavit states that complainant has no property exempt and is unable to give security ..	331
when motion to exclude evidence for variance is properly overruled.....	340
peremptory instruction to find for defendant is properly refused if there is sufficient evidence to go to the jury and support a verdict if rendered.....	340
master's approved finding of fact will stand on appeal, unless clearly incorrect.....	350
one cannot, on appeal, complain of error in another decree which was not appealed from .....	350
finding of fact having no bearing on issue not prejudicial..	350
when findings of fact that certain defendants were non-residents and insolvent cannot be complained of. ....	351
parties who appear, plead and submit to the jurisdiction of the court over their persons cannot thereafter be heard to question it.....	351

APPEALS AND ERRORS.— <i>Continued.</i>	PAGE.
a bill of exceptions is not incomplete because objects exhibited to the jury cannot be incorporated therein .....	358
a recital in the record of the Appellate Court cannot be contradicted by resort to its opinion.....	358
when freehold is not involved so as to permit a case to go directly to the Supreme Court.....	361
insufficiency of evidence to sustain certain counts cannot be urged on appeal where appellant's instructions submitted the issues raised by such counts.....	366
general demurrer to declaration containing common and special counts is properly overruled if former are good..	392
judgment of Appellate Court reversing judgment and remanding cause for further proceedings is not final judgment from which an appeal will lie.....	392
when appellant cannot complain that court ordered his plea of general issue to stand to the amended declaration....	411
objection that the record is not complete is without force where it does not indicate that reference to alleged missing portions is necessary.....	440
when exception to master's report is too general to raise the point of variance on appeal.....	456
appeal lies to Appellate Court where only the construction of a statute, and not its validity, is involved.....	512
instruction that accused must "satisfactorily" rebut People's case is ground for reversal.....	544
cross-examination of accused covering matters already in evidence concerning his past life is not error.....	544
discharge of receiver without directing payment of costs of receivership is not error, where there is nothing in the record to show such costs were not paid.....	555
the Statute of Frauds cannot be relied upon in Supreme Court when not pleaded or urged below.....	570
party cannot complain of correct modification of his proposition of law which might have been refused.....	575
amount of damages awarded on a fire policy is not reviewable in Supreme Court when presented as a question of fact on appeal from Appellate Court.....	575
effect where case is tried on erroneous theory of law.....	582
an objection to an amendable defect in attachment affidavit cannot be first raised on appeal.....	582
 ASSAULT.	
an indictment for assault with intent to murder is insufficient which fails to allege the assault was felonious.....	408
 ASSUMPSIT.	
when action lies for money had and received.....	173

## ATTACHMENT.

	PAGE.
interpleading claimant of attached property may prove his own acts of ownership tending to show a change in character of his previous possession as agent.....	120
attachment judgment is inadmissible to prove that plaintiffs were entitled to attack mortgage as creditors, where mortgage antedates judgment by a year.....	120
when statement in attachment affidavit of non-residence of defendant corporation is sufficient.....	582
when a misstatement in attachment notice of time for appearing in court is not fatal to jurisdiction.....	582
that an attachment bond was signed by only one partner as principal does not go to the jurisdiction of the court over the attachment proceeding.....	582
garnishee may attack a judgment against attachment defendant for want of jurisdiction, only.....	582

## ATTESTATION.

subscribing witnesses to will may sign before testator, if he signs in their presence and as part of same transaction..	122
---	-----

## ATTORNEYS AT LAW.—See SOLICITORS' FEES.

the act of 1899, concerning the qualifications necessary for admission to the bar, is to be construed as having prospective operation, only.....	73
any law attempting to prescribe conditions for admission to the bar must be general, and its classification must have a reasonable basis and not be arbitrary.....	73
proviso to section 1 of act of 1899, on admission to the bar, is unconstitutional, being special legislation, based on an arbitrary and unreasonable classification.....	73
the power to prescribe educational qualifications necessary for admission to the bar is a judicial and not a legislative power.....	73
limits of legislature's right to regulate admission to the bar.	73
proviso to section 1 of act of 1899, on admission to the bar, is in violation of article 3 of the constitution, concerning the division of governmental powers.....	74
attorney shown to have been convicted of larceny will be disbarred by Supreme Court on information filed by the Attorney General.....	574

## BAILMENTS.

a warehouseman has no property in stored grain which is subject to levy and sale.....	564
title to grain merely stored in private warehouse does not pass to the warehouseman.....	564

## BANKS.

	PAGE.
right of bank to apply correspondent's deposit to payment of its debt as against the latter's check not presented for payment at that time.....	279
when payee of check is entitled to a share in fund arising from drawee's sale of drawer's collateral.....	279

## BASTARDS.—See ILLEGITIMATES.

## BENEFIT SOCIETIES.

whether deceased member of benefit society was in good standing is a question of fact settled by the judgment of the Appellate Court.....	206
section 10 of act of 1897, legalizing action taken by benefit societies at meetings held outside the State, is not unconstitutional.....	214
charter members of Modern Woodmen of America have no rights not common to other members of the order... ..	214
directors of benefit society may change location of head office in the manner provided for amending its articles of association.....	214
in absence of ratification a benefit society is not liable on contract by its promoters before incorporation to locate head office in particular place.....	214
benefit society cannot be required to perpetually perform a contract with reference to location of principal office.	215
the head office of a benefit society may be moved by direction of its legislative body without the unanimous consent of members.....	215

## BILLS AND NOTES.

right of bank to apply correspondent's deposit in payment of its debt as against the latter's check not presented for payment at that time.....	279
when payee of check is entitled to share in fund arising from drawee's sale of drawer's collateral .....	279
when payee of check is entitled to relief under bill to marshal securities.....	279
proof that note bore "interest at six per" warrants finding by jury that interest was six per cent per annum.....	411
chattel mortgage not void, under act of 1895, for failure of note to state that it is secured by chattel mortgage unless the note has been assigned .....	448
when maker of note is a competent witness in behalf of sureties after payee's death.....	614
agreement by creditor to extend time need not be based on money consideration in order to release surety.....	614
payment of interest in advance will support a promise to extend time .....	614

	PAGE.
<b>BILLS AND NOTES.—Continued.</b>	
payment of interest already due, upon promise to extend time, does not release surety.....	615
promise to extend time indefinitely and without consideration does not release surety.....	615
when surety is not released by extension of time .....	615
<b>BILLS OF EXCEPTION.</b>	
a bill of exceptions cannot be taken to review a judgment of the Appellate Court rendered in the exercise of its jurisdiction as a court of error.....	162
a bill of exceptions is not incomplete because objects exhibited to the jury cannot be incorporated therein.....	358
<b>BONDS.</b>	
that attachment bond is signed by only one partner as principal does not go to the jurisdiction of the court over the attachment proceeding.....	583
<b>BOUNDARIES.</b>	
monuments of the original survey are better evidence of the boundaries of city lots than field notes, maps or plats. ....	165
boundary between States bordering upon a river is at the center of the permanent channel .....	426
riparian boundaries follow gradual changes in main channel of the stream.....	426
the local boundary between Illinois and Missouri is west of Willow Bar Island, in the Mississippi .....	426
<b>BREACH OF CONTRACT.—See CONTRACTS.</b>	
<b>BUILDING SOCIETIES.—See LOAN ASSOCIATIONS.</b>	
<b>BURDEN OF PROOF.</b>	
plaintiff in ejectment relying for title on execution sale under section 39 of Judgment act, must show that notice of sale was served as required by statute.....	170
the burden of showing abandonment of an easement rests upon the party asserting it .....	372
creditor has the burden of showing surety's full knowledge of the acts of the debtor and creditor relied upon by the surety as releasing him .....	614
<b>CASES CONTROLLED BY OTHERS.—See FORMER CASES.</b>	
<i>Cummings v. West Chicago Park Comrs.</i> ( <i>ante</i> , p. 136,) controls	
<i>Prescott v. Park Comrs.</i> .....	194
<i>Revell v. People</i> , 177 Ill. 468, decides the material questions involved in <i>Gordon v. Winston</i> .....	338
<i>Holden v. City of Chicago</i> , 172 Ill. 263, controls <i>Cruickshank v. City of Chicago</i> .....	415

## CHANGE OF VENUE.

	PAGE.
when denial of motion for change of venue is not reviewable on appeal.....	215

## CHATTEL MORTGAGES.—See MORTGAGES.

## CHECKS.—See BILLS AND NOTES.

## CITIES.—See MUNICIPAL CORPORATIONS.

## CLOUD ON TITLE.

to maintain a bill to remove a cloud the complainant must allege and prove either that he is in possession or that the property is unoccupied.....	149
when allegation of fraud in bill to remove cloud is sufficient to warrant relief.....	195
a tax deed will be set aside as a cloud where the affidavit for the deed falsely and fraudulently stated that premises were vacant and unoccupied..	195

## COLOR OF TITLE.—See LIMITATIONS.

## COMMERCIAL PAPER.—See BILLS AND NOTES.

## CONDEMNATION.

amount of condemnation verdict will not be disturbed on appeal, where the jury viewed the premises and the verdict is within the range of evidence.....	243
depreciation in market value from construction of railroad is the measure of damages to land not actually taken for right of way.....	243
use to which land taken for right of way is adapted enters into the question of damages, if such use affects its market value.....	243

## CONFIDENCE GAME.—See CRIMINAL LAW.

## CONSIDERATION.—See CONTRACTS; BILLS AND NOTES.

a voluntary trust created for the settlor's benefit may be enforced without further consideration.....	248
--	-----

## CONSTITUTIONAL LAW.

any law attempting to prescribe conditions for admission to the bar must be general, and its classification must have a reasonable basis and not be arbitrary.....	73
proviso to section 1 of act of 1899, on attorneys, is unconstitutional, being special legislation, based on an arbitrary and unreasonable classification.....	73

CONSTITUTIONAL LAW.—*Continued.*

## PAGE.

the power to prescribe educational qualifications necessary for admission to the bar is judicial, and not legislative..	73
proviso to section 1 of act of 1899, on admission to the bar, is unconstitutional, being in violation of article 3, concerning division of governmental powers.....	74
it is a sufficient compliance with the constitution if the title of an act suggests its subject matter.....	214
a statute is not special legislation merely because it is directed to a particular subject.....	214
section 10 of act of 1897, legalizing action of benefit societies at meetings held outside the State, is not unconstitutional.....	214
provision of section 11 of the act on mines, requiring mine owners to pay inspection fees, is a valid exercise of police power and is constitutional.....	270
section 29 of article 4 of constitution, requiring legislation to protect miners, does not deprive legislature of right to impose inspection fees.....	270
section 99 of the Criminal Code, concerning the confidence game, is not in violation of the constitutional right of accused to demand the nature of the accusation.....	477

## CONSTRUCTION.

of instrument in writing, as being a valid conveyance under section 9 of the Conveyance act.....	49
of trust deed, as not being testamentary.....	50
of act of 1899, on admission to the bar, as having prospective operation, only.....	73
of proviso to section 1 of act of 1899, on admission to the bar, as being special legislation.....	73
of proviso to section 1 of act of 1899, on admission to bar, as being usurpation of judicial power by legislature.....	74
of term "unnecessary danger," used in an accident policy, as to what danger may be incurred without violating the terms of the policy.....	111
of section 6 of act on oaths and affirmation, as to when certificate by foreign notary is not <i>prima facie</i> evidence of his authority to administer oaths.....	129
of sections 12 and 13 of Chancery act, concerning service of notice by publication, as to when recital in a decree does not satisfy their requirements .....	129
of clauses of will, as not being in conflict.....	182
of section 132 of Criminal Code, authorizing a stranger to sue for treble sum lost in gaming, as to its extending to gambling in grain options.....	199
of section 132 of Criminal Code, as to who is a "winner" in a grain gambling transaction.....	199

CONSTRUCTION.—*Continued.*

	PAGE.
of inconsistent clauses of will—what essential to application of rule that last clause will prevail.....	343
of clause of will restricting power of alienation, as being void for repugnancy.....	343
of section 7 of Limitation act, as to who must take possession of land after seven years' payment of taxes thereon as vacant property.....	382
object of statute and evil to be remedied by it may be considered in determining whether a thing within the letter of a statute is within its meaning.....	448
in case of doubt, a construction upholding a provision is preferred to one which will render it invalid as not embraced within the title of the act.....	448
of section 1 of Mortgage act of 1895, requiring note to state that it is secured by chattel mortgage, as being effective only when the note has been assigned.....	448
terms used in a statute without explanation will be construed in their common law significance.....	504
of clause 5 of section 2 of Statute of Descent, as not authorizing one to claim estate of illegitimate as next of kin to mother if kinship is traced through alien blood...	504
of Alien act of 1887, as applicable to estate of illegitimates as well as legitimates.....	504
of Alien act of 1897, as not affecting prior rights which have vested by way of escheat.....	505
of act of 1874, on escheats, as superseding all previous enactments and applying to estates of illegitimates.....	505
a devise without words of inheritance is subject to construction, notwithstanding it complies with the requirements of section 13 of the Conveyance act .....	514
a general clause in a will must give way to a specific one immediately following it and restricting the operation of the general provision.....	514
of subsequent clause of will, as not reducing the prior devise of the fee to a life estate.....	514
repeals by implication are not favored.....	521
when subsequent general law does not repeal prior special law on same general subject.....	521
of Election law of 1891, as to its not repealing the special act of 1872, providing the manner of holding elections for removal of county seats.....	521
the court leans to that construction of an insurance policy which will afford insured indemnity.....	575
when recitals in agreement may be given force.....	583
the word "penalty," used in a contract, <i>prima facie</i> excludes the notion of stipulated damages, though not conclusive.	583

CONSTRUCTION.—*Continued.*

PAGE

provision of contract naming amount of damages for its breach construed as penalty and not liquidated damages. 583  
of section 11 of Practice act, as to when judgment against one partner on joint note does not release the other.... 625

## CONTRACTS.

a contract beyond the power of a corporation is void, and estoppel to plead *ultra vires* cannot be based on fact that corporation has received benefits..... 35  
a contract by a loan association to purchase real estate in which it has no interest is not enforceable..... 35  
an agreement that property shall be assessed only a certain amount on account of building restrictions is not binding after owner obtains a decree removing restrictions..... 136  
a binding contract of insurance is not effected if there is neither delivery of policy, payment or tender of the premium, or promise to pay the same..... 158  
in absence of ratification a corporation is not liable on a contract by its promoters, before incorporation, to locate its principal office in a particular place. .... 214  
a benefit society cannot be required to perpetually perform a contract with reference to the location of its principal office in a certain city..... 215  
city cannot sue in its own name on a contract to locate head office of corporation in the city in consideration of donations by its citizens..... 215  
persons assuming to act as directors before stock is subscribed in good faith are personally liable for debts contracted by them in the corporate name..... 237  
oral contract to convey land must be clearly established where the Statute of Frauds is pleaded..... 464  
to satisfy the Statute of Frauds a contract to convey land must be in writing, and not rest partly in parol..... 464  
a contract to convey land is uncertain which specifies no time for completing sale, making payments, delivering deed or paying interest ..... 464  
part performance, in order to take a contract out of the Statute of Frauds, must be under the contract relied upon, and not under some other claim of title..... 484  
notice of contract to convey land, which is void under the Statute of Frauds, does not affect a subsequent purchaser from the proposed vendor..... 465  
facts under which a verbal contract to convey land will be specifically enforced..... 570  
effect of warranty of quality and fitness by manufacturer. 582  
evidence of breach of warranty is competent though the article has been received and used..... 583

CONTRACTS.— <i>Continued.</i>	PAGE.
when recitals of contract may be given force .....	583
a sum named as damages for breach of a contract is a penalty if contract is indefinite and uncertain in its terms..	583
a sum agreed to be paid as damages in case of failure to promptly deliver articles is a penalty if it greatly exceeds the damages actually sustained.....	583
mere copy of contract is not entitled to record, as it has no legal force and is not an instrument of which the law takes notice.....	633
in specific performance a vendee cannot urge an objection to the vendor's title which he has purposely created to embarrass the vendor.....	633

CONTRIBUTORY NEGLIGENCE.—See NEGLIGENCE.

CONVEYANCES.—See DEEDS; MORTGAGES.

instrument construed as a valid conveyance under the requirements of section 9 of Conveyance act.....	49
the mere copy of a contract is not entitled to record, as it has no legal force and is not an instrument of which the law takes notice.....	633
the record of an unsigned copy of a contract is not constructive notice.....	633

CORONERS.

stenographic notes at coroner's inquest not admissible to contradict witness, as the latter's deposition required to be taken by the coroner is the best evidence. . . . .	323
in absence of evidence to the contrary it will be presumed, on appeal, that coroner required testimony to be written out and signed as provided by law.....	323

CORPORATIONS.—See MUNICIPAL CORPORATIONS; RAILROADS.

receiving benefits of contract may estop corporation from pleading <i>ultra vires</i> , if contract is within power of corporation but the power was improperly exercised .....	35
a contract beyond the power of a corporation is void, and estoppel to plead <i>ultra vires</i> cannot be based on fact that corporation has received benefits .....	35
one dealing with a corporation of limited powers is chargeable with notice of such limitation.....	35
a loan association cannot trade in real estate except as authorized by statute, in the case of buying in property in which it has an interest.. . . . .	35
deficiency decree cannot be rendered against loan association on foreclosure of mortgage assumed in purchasing property in which it had no interest.....	35

	PAGE
<b>CORPORATIONS.—Continued.</b>	
a contract by a loan association to purchase property in which it has no interest is not enforceable.....	35
section 10 of act of 1897, legalizing action taken by benefit societies at meetings held outside the State, is not unconstitutional.....	214
charter members of Modern Woodmen of America have no rights not common to other members.....	214
directors of benefit society may change location of head office in the manner provided for amending its articles of association.....	214
in absence of ratification a corporation is not liable on a contract by its promoters, before incorporation, to locate head office in a particular place.....	214
a benefit society cannot be required to perpetually perform a contract with reference to location of principal office..	215
the principal office of a benefit society may be moved, by direction of its legislative body, without the unanimous consent of its members.....	215
persons assuming to act as directors before stock is subscribed in good faith are personally liable for debts contracted in corporate name.....	237
a lease of premises for "saloon" purposes is not <i>ultra vires</i> a corporation organized to manufacture and sell soda water	622
when lease for "saloon" purposes by corporation is not void, so as to excuse payment of rent, though corporation sells liquor in excess of its charter power.....	622
<b>COSTS.</b>	
an order to give bond for costs, for failure to comply with which the suit is dismissed, is a final order, from which an appeal may be taken.....	331
refusal to permit complainant to prosecute as a poor person is not error, where affidavit states that complainant has no property exempt and is unable to give security..	331
discharge of receiver without directing payment of costs of receivership is not error, where there is nothing in the record to show such costs were not paid.....	555
<b>COUNTY SEATS.</b>	
election for county seat removal may be held under the special act of 1872, providing therefor, as such act was not repealed by the general Election law of 1891.....	521
<b>COURTS.—See APPEALS AND ERRORS.</b>	
rule that chancellor's facilities for passing on evidence are better than those of a court of review does not apply to depositions.....	22

COURTS.—*Continued.*

	PAGE.
under rule 16 of Supreme Court, alleged error or ground for reversal cannot be first urged in reply brief.....	31
mixed questions of law and fact in suits at law are settled by the judgment of the Appellate Court.....	31
courts will give a statute prospective operation, only, if the legislature's intention in that respect is doubtful....	73
the act of 1899, concerning admission to the bar, has prospective operation, only.....	73
the power to prescribe educational qualifications necessary for admission to the bar is judicial, and not legislative..	73
proviso to section 1 of act of 1899, on admission to the bar, is unconstitutional, being in violation of article 3, concerning the division of governmental powers.....	73
court cannot permit complete record to be filed after second day of term, unless what purports to be a transcript has been previously filed .....	162
a bill of exceptions cannot be taken to review a judgment of the Appellate Court rendered in the exercise of its jurisdiction as a court of error.....	162
it is presumed that a circuit court of a foreign State is a court of record.....	267
a recital in the record of the Appellate Court cannot be contradicted by resort to its opinion.....	358
when freehold is not involved, so as to permit case to go directly to Supreme Court.....	361
judgment of Appellate Court reversing judgment and remanding cause for further proceedings is not a final judgment from which an appeal will lie.....	392
appeal lies to Appellate Court where only the construction of a statute, and not its validity, is involved. ....	512
attorney shown to have been convicted of larceny will be disbarred by Supreme Court on information filed by Attorney General.....	574

## CREDITORS.—See DEBTOR AND CREDITOR.

## CRIMINAL LAW.

right of stranger, under section 132 of Criminal Code, to sue for treble sum lost in gaming if loser does not sue, extends to gambling in grain options .....	199
section 132 of the Criminal Code construed, as to who is a "winner" in a grain gambling transaction .....	199
an indictment for assault with intent to murder is insufficient which fails to allege that assault was felonious....	408
indictment framed under section 99 of Criminal Code sufficiently apprises accused of the nature and cause of the accusation against him.....	477

CRIMINAL LAW.— <i>Continued.</i>	PAGE.
when indictment sufficiently charges an attempt to obtain money by use of the confidence game.....	477
section 99 of the Criminal Code, providing the manner of charging crime of confidence game, is constitutional.....	477
essentials of an attempt to commit crime are the intent, the performance of some overt act and the failure to consummate the crime intended.....	477
prosecution for obtaining money by confidence game should be instituted where most of the overt acts took place and the money was obtained .....	477
attempt to obtain money by confidence game is not proved by evidence showing the actual obtaining of the money but in another county.....	477
when cross-examination of accused is not prejudicial, as tending to establish his reputation after the crime.....	544
cross-examination of accused covering matters already in evidence concerning his past life is not error.....	544
when exclusion of testimony of witness at coroner's inquest is proper .....	544
instructions for People in murder trial may be framed on theory that the killing was murder, if consistent with evidence and question of manslaughter is fully presented ..	544
instruction that accused must "satisfactorily" rebut People's case is ground for reversal.....	544
 DAMAGES.	
amount of condemnation verdict will not be disturbed on appeal, where the jury viewed the premises and the verdict is within the range of the evidence.....	243
depreciation in market value from construction of railroad is the measure of damages for land not actually taken for right of way.....	243
use to which land taken for right of way is adapted enters into the question of damages if such use affects its market value.....	243
verdict for \$100 in trespass against city for removing the plaintiff's fences and injuring his trees held not excessive.	396
the amount of damages awarded on a fire policy is not reviewable in Supreme Court when presented as a question of fact on appeal from Appellate Court.....	575
the word "penalty," used in a contract, <i>prima facie</i> excludes the idea of stipulated damages but is not conclusive.....	583
a sum named in a contract as damages for its breach is a penalty, where the contract is indefinite and uncertain..	583
when sum named as damages for breach of contract is a penalty and not liquidated damages.....	583

DAMAGES.—*Continued.*

## PAGE.

a sum agreed to be paid in case of failure to promptly deliver articles is a penalty, if it greatly exceeds the actual damage suffered through the delay..... 583

## DEBTOR AND CREDITOR.

interpleading claimant of attached property may prove his own acts of ownership tending to show a change in character of his previous possession as agent. .... 120  
 attachment judgment is inadmissible to prove that plaintiffs were entitled to attack mortgage as creditors, where mortgage antedates judgment by a year..... 120  
 persons assuming to act as directors before stock is subscribed in good faith are personally liable for debts contracted by them in the corporate name..... 237  
 a junior judgment creditor cannot be deprived of his statutory right to redeem by being joined as a party on foreclosure against the debtor..... 421  
 a judgment creditor may redeem within fifteen months although he obtained a deed from the mortgagors after the expiration of twelve months..... 421  
 chattel mortgage not void, under act of 1895, for failure of note to state that it is secured by chattel mortgage, unless the note has been assigned ..... 448  
 right of chattel mortgagee to take possession under insecurity clause is not arbitrary, but must be based on circumstances amounting to probable cause..... 449

## DEDICATION.

under Revised Statutes of 1845 an attempted dedication was ineffectual where each owner did not personally acknowledge the plat..... 396  
 a public dedication by mortgagor without consent of mortgagee fails if the latter acquires title on foreclosure.... 396  
 when owner of land is not estopped to deny the validity of dedication for highway by acts of parties from whom she derived title..... 396

## DEEDS.

instrument construed as a valid conveyance under requirements of section 9 of Conveyance act..... 49  
 when trust deed is not defeated by reservations permitting grantor to use the property during his life. .... 49  
 a trust deed containing granting words *in presenti* is not rendered testamentary because of reservations respecting the use of the property during the grantor's life.... 50  
 when trust deed is well delivered..... 50

DEEDS.—*Continued.*

PAGE

evidence must be clear to warrant reformation, in equity, of an alleged mutual mistake in a deed so as to include land not covered thereby.....	167
an allegation that grantors did not comprehend the effect of their trust deed must be accompanied by an allegation of accident or mistake.....	249
a trust deed left for record by the grantor, in obedience to the trustee's instructions and with the intention of passing title, is well delivered.....	249
an acknowledgment of foreign deed may be shown to be in proper form by introduction of statute book.....	267
a deed more than thirty years old at time of trial is "ancient," though less than such age when suit was begun..	529
an "ancient deed" coming from the proper custody is admissible in evidence without proof of execution.....	529
existence of valid power of attorney will be presumed in favor of an "ancient deed" which purports to have been executed by an attorney in fact.....	529
title passes on delivery of deed to grantee, although the deed is returned to the grantor to be held by him for an outside purpose ..	570

DELIVERY.—See DEEDS.

DEMURRER.—See PLEADING.

DEPOSITIONS.—See EVIDENCE.

## DESCENT.

one cannot claim estate of illegitimate as next of kin of mother if compelled to trace kinship through alien blood.	504
the provisions of the Alien act of 1887 apply to estates of illegitimates as well as legitimates .....	504
the Alien act of 1887 does not apply to rights in property which have vested by way of escheat prior to its passage.	505
the act of 1874 superseded all previous enactments concerning escheats, and applies to estates of illegitimates.....	505

## DISBARMENT.

attorney shown to have been convicted of larceny will be disbarred by Supreme Court on information filed by Attorney General.....	574
---	-----

## DIVORCE.

when evidence in suit for divorce is insufficient to establish the fact of marriage.....	347
--	-----

## DRAINAGE.

## PAGE.

owner of dominant heritage cannot connect with drainage ditch without thereby subjecting himself to provisions of section 42 of Farm Drainage act.....	177
one connecting with a drainage ditch is estopped to deny that his lands are benefited.....	177
when drainage ditch is within the provisions of the Drainage act of 1889, concerning drains for mutual benefit of all interested lands.....	372
one whose right to unobstructed flow of water in ditch is a perpetual easement may have a mandatory injunction to compel removal of obstruction.....	372
an easement to maintain a drainage ditch is not extinguished by unexecuted parol agreement to fill up ditch..	372
when a parol license to construct drainage ditch becomes irrevocable.....	372

## EASEMENTS.

one whose right to unobstructed flow of water in ditch is a perpetual easement may have a mandatory injunction to compel removal of obstruction.....	372
an easement to maintain a drainage ditch is not extinguished by unexecuted parol agreement to fill up ditch..	372
one asserting abandonment has the burden of proof.....	372
when a parol license to construct drainage ditch becomes irrevocable.....	372

## EJECTMENT.

proof that grantee's grantors were in possession claiming ownership when they conveyed, raises a presumption of title in him.....	154
a trespasser cannot, in an ejectment suit against him, set up an outstanding title in a stranger.....	154
facts under which ejectment may be maintained .....	154
monuments of the original survey are better evidence of the boundaries of city lots than field notes, maps or plats.	165
plaintiff in ejectment relying for title on execution sale under section 39 of Judgment act, must show that notice of sale was served as required by statute.....	170
one claiming under payment of taxes for seven years on vacant property must show that he took possession after full period of payment.....	382
what will not constitute the possession required by law to complete the bar of section 7 of Limitation act.....	383

## ELECTIONS.

elections for county seat removal may be held under the special act of 1872, providing therefor, as such act was not repealed by the Election law of 1891.....	521
--	-----

## EMINENT DOMAIN.

	PAGE
amount of condemnation verdict will not be disturbed on appeal, where the jury viewed the premises and the verdict is within the range of evidence.....	243
depreciation in market value from construction of railroad is the measure of damages to land not actually taken for right of way.....	243
use to which land taken for right of way is adapted enters into the question of damages if such use affects its market value.....	243

## EQUITABLE CONVERSION.

interest of child under a will is not subject to levy and sale as real estate, where, by the terms of the will, there is an equitable conversion into money.....	182
--	-----

## EQUITY.

evidence must be clear to warrant reformation, in equity, of an alleged mutual mistake in a deed so as to include land not covered thereby.....	167
if bill for injunction alone is without equity, court may, on denying motion for injunction, dismiss bill without permitting defendant to answer .....	186
equity will not relieve against special tax ordinance on the ground that it is unreasonable or oppressive, as there is an adequate remedy at law. ....	186
a general demurrer which fails to point out any defects in the bill is properly overruled if the bill has equity.....	195
a tax deed will be set aside as a cloud where the affidavit therefor falsely and fraudulently stated that the premises were vacant and unoccupied.....	195
use of public street with consent of city authorities cannot be enjoined by an abutting owner.....	289
injunction will not lie where adequate remedy at law exists by way of an action for damages.....	289
the answer is to be taken as true where cause is submitted for hearing on the bill and answer.....	440
private party must sustain special and irreparable injury to entitle him to enjoin obstruction of street.....	605
when street railway company cannot enjoin the construction of a sub-way by a railroad company acting under a track elevation ordinance.....	605
when injunction will not be granted to avoid a multiplicity of suits.....	605
equity will not permit a vendee to take advantage of his own bad faith .....	633
when equity will not retain a bill for specific performance to assess damages for breach of contract.....	633

## ESCHEATS.

the Alien act of 1897 does not apply to rights in property which have vested by way of escheat prior to the passage of the act .....	505
the act of 1874 superseded all previous enactments respecting escheats, and applies to estates of illegitimates.....	505

## ESTOPPEL.

receiving benefits of contract may estop corporation from raising defense of <i>ultra vires</i> if contract is within power of corporation but power was improperly exercised.....	35
a contract beyond the power of a corporation is void, and estoppel to plead <i>ultra vires</i> cannot be based on fact that corporation has received benefits.. .....	35
one connecting with a drainage ditch is estopped to deny that his lands are benefited.....	177
parties who appear, plead and submit to the jurisdiction of court over their persons cannot thereafter question it.	351
insufficiency of the evidence to sustain certain counts can not be urged on appeal, where the appellant's instructions submitted the issues raised by such counts.....	366
when owner of land is not estopped to deny validity of dedication for highway purposes by the acts of parties from whom she derived title.....	396

## EVIDENCE.—See ANCIENT DOCUMENTS.

rule that chancellor's facilities for passing on evidence are better than those of a court of review does not apply to depositions.....	22
suspicion attaching to transactions between parties in fiduciary relation is removed by evidence of fair dealing and absence of improper influence.....	22
if a trust is clearly manifested, though incidentally, it is immaterial that the writing was not executed for the express purpose of declaring the trust.....	22
when trust is sufficiently manifested in deposition filed by the declarant in a proceeding to set aside his deed.....	22
when evidence shows good delivery of trust deed .. ..	50
interpleading claimant of attached property may prove his own acts of ownership tending to show a change in the character of his previous possession as agent .. ..	120
attachment judgment not admissible to show that plaintiffs were entitled to attack mortgage as creditors, where the mortgage antedates judgment by a year.....	120
certificate of foreign notary, under seal, is not <i>prima facie</i> evidence of his authority to administer oaths, unless fact of such authority is recited therein.....	129

EVIDENCE.— <i>Continued.</i>	PAGE.
recital in partition decree that notice of suit was published for thirty days does not establish jurisdiction under sections 12 and 13 of Chancery act.....	129
recital in ordinance that improvement petition was presented is <i>prima facie</i> evidence of existence of such jurisdictional fact.....	136
recital in ordinance that improvement petition was presented is sufficient although the contents of the petition are not stated.....	136
to maintain a bill to remove a cloud from title the complainant must prove either that he is in possession or that the property is unoccupied.....	149
proof of the execution of a deed without proof of possession does not prove title.....	149
proof of possession under claim of ownership is <i>prima facie</i> evidence of ownership in the claimant.....	149
proof that grantee's grantors were in possession claiming ownership when they conveyed raises a presumption of title in him. ....	154
facts under which ejectment may be maintained .....	154
monuments of the original survey are better evidence of the boundaries of city lots than field notes, maps or plats. ....	165
evidence must be clear to warrant reformation, in equity, of an alleged mutual mistake in a deed so as to include land not covered thereby.....	167
plaintiff in ejectment relying for title on an execution sale, under section 39 of Judgment act, must show that notice of sale was served as required by statute.....	170
when presumption of ownership from possession of personal property cannot prevail.....	210
objection to sufficiency of foundation laid for introduction of deed records cannot be first raised on appeal.....	266
Auditor's certificate is evidence that specified lands were ceded to county as swamp lands.....	266
admission of deeds—it is presumed that a circuit court of a foreign State is a court of record. ....	267
an acknowledgment of foreign deed may be shown to be in proper form by introduction of statute book.....	267
evidence that crossing where injury occurred was in populous part of city is competent in action for damages....	323
testimony that train was going "fast" is competent, though witness is unable to state the speed in miles per hour....	323
height to which plaintiff's intestate was thrown by train is competent, as bearing on question of the rate of speed at which the train was running.....	323
witness who crossed track just ahead of plaintiff's intestate may testify as to condition of gates when he crossed....	323

EVIDENCE.— <i>Continued.</i>	PAGE
stenographic notes at coroner's inquest not competent to contradict witness, as the latter's deposition required to be kept by the coroner is the best evidence.....	323
in the absence of evidence to the contrary it will be presumed, on appeal, that a coroner required testimony to be written out and signed as provided by law.....	323
when admission of improper evidence to impeach plaintiff's witness will work reversal.....	324
when evidence in suit for divorce is insufficient to establish the fact of marriage.....	347
the burden of proof to show abandonment of an easement rests upon the party asserting it.....	372
proof of payment of taxes under color of title must be clear and convincing, since it defeats the paramount title....	382
what not such possession of land as is necessary to complete the bar of section 7 of Limitation act.....	383
former wills made when testator's sanity was unquestioned are admissible on the question of mental capacity, where they are substantially like the will in contest.....	400
proof that note bore "interest at six per" warrants finding by jury that interest was six per cent per annum.....	411
declarations by former owners disclaiming title to an acreation are not admissible to prejudice title of grantee..	426
in replevin against mortgagee, latter may show in defense that probable cause existed for believing the debt insecure before he took possession of the chattels.....	449
oral contract to convey land must be clearly established where the Statute of Frauds is pleaded .....	464
declarations by one party not in the presence of the other are not admissible in his own favor .....	464
party cannot testify to contents of letter written by him to adverse party, where no notice to the latter to produce the letter was given .....	464
to satisfy the Statute of Frauds a contract to convey land must be in writing, and not rest partly in parol.....	464
contract to convey is uncertain where no time for completing sale, making payments, delivering the deed or making interest payments is specified .....	464
attempt to obtain money by confidence game is not proved by evidence showing the actual obtaining of the money, though in another county.....	477
a deed more than thirty years old at time of trial is "ancient," though less than such age when suit was begun..	529
existence of a valid power of attorney will be presumed in favor of an "ancient deed" which purports to have been executed by an attorney in fact.....	529

	PAGE.
<b>EVIDENCE.—Continued.</b>	
an "ancient deed," coming from the proper custody, is admissible without proof of execution.....	529
when cross-examination of accused is not prejudicial, as tending to show his reputation after the crime .....	544
cross-examination of accused covering matters already in evidence concerning his past life is not error.....	544
when exclusion of testimony of witness at coroner's inquest is properly excluded in murder trial .....	544
instruction that accused must "satisfactorily" rebut People's case is ground for reversal.....	544
under what circumstances verbal contract to convey land will be specifically enforced.....	570
when evidence of gift by mortgagor is competent against him in proceeding to foreclose a mortgage subsequently given by him on the land.....	570
evidence of breach of warranty is competent though the article has been received and used .....	583
when recitals in contract may be given force .....	583
the word "penalty," in a contract, <i>prima facie</i> excludes the notion of stipulated damages though not conclusive.....	583
creditor has the burden of showing surety's full knowledge of acts of the debtor and creditor relied upon as releasing such surety.....	614

**FARM DRAINAGE.—See DRAINAGE.**

**FIDUCIARY RELATIONS.**

suspicion attaching to transactions between parties in fiduciary relation is removed by evidence of fair and open dealing and absence of improper influence. ....	22
---	----

**FIXTURES.**

when fire policy will embrace fixtures in a building though part of them are covered by other insurance.....	575
--	-----

**FORECLOSURE.—See MORTGAGES.**

deficiency decree cannot be rendered against loan association on foreclosure of mortgage assumed in purchasing property in which it had no interest.....	35
partition of mortgaged property lying in two counties—effect of release, as to mortgagor's undivided interest, upon lien created by the decree.....	64
when second mortgagee is entitled to continuation of receivership under sale on foreclosure of first mortgage...	440
a stipulated solicitor's fee may be allowed on foreclosure, in absence of evidence of unreasonableness.....	456

## FORMER CASES.—See CASES CONTROLLED BY OTHERS.

<i>Thorn v. West Chicago Park Comrs.</i> 130 Ill. 594, distinguished and explained, as to extent to which recital in ordinance is <i>prima facie</i> evidence.....	136
<i>Pardridge v. Morgenthau</i> , 157 Ill. 395, followed, as to rule that bill of exceptions cannot be taken to review judgment of Appellate Court when acting as a court of error.....	162
<i>Bastian v. Modern Woodmen</i> , 166 Ill. 595, distinguished, as to when directors of benefit society may change location of its principal office.....	214
<i>Holden v. City of Chicago</i> , 172 Ill. 263, followed, as to invalidity of paving ordinance which does not show height of curb.	242
<i>Pedro v. Carricker</i> , 168 Ill. 570, explained, as to who must take possession of land after payment of taxes thereon under section 7 of Limitation act.....	382
<i>Fell v. Young</i> , 63 Ill. 106, distinguished, as to when existence of valid power of attorney will be presumed in favor of deed purporting to be made by attorney in fact.....	529

## FRATERNAL SOCIETIES.—See BENEFIT SOCIETIES.

## FRAUD.—See STATUTE OF FRAUDS.

it is not sufficient to charge fraud generally with reference to a transaction, but the specific acts must be alleged...	195
when allegation of fraud in bill to remove cloud is sufficient, after decree <i>pro confesso</i> , to sustain the relief granted...	195
a tax deed will be set aside as a cloud where the affidavit therefor falsely and fraudulently stated that the premises were vacant and unoccupied.....	195

## FREEHOLD.

when freehold is not involved so as to permit case to go directly to Supreme Court.....	361
---	-----

## GAMING.

right of a stranger, under section 132 of Criminal Code, to sue for treble sum lost in case loser fails to sue, extends to losses in grain gambling.....	199
section 132 of the Criminal Code construed, as to who is a "winner" in a grain option transaction.....	199
the severity of the penalty imposed by a statute against gambling furnishes no reason against its enforcement...	199

## GARNISHMENT.

garnishee may attack judgment against attachment defendant for want of jurisdiction only.....	582
---	-----

## GENERAL ASSEMBLY.—See LEGISLATURE.

## HACK STANDS.

	PAGE.
city may establish public hack stands in street in front of railroad depots.....	289
a railroad company is powerless to grant exclusive hack privileges in street beyond limits of its own property....	289
use of street as public hack stand, authorized by city authorities, cannot be enjoined by private owner.....	289

## HIGHWAYS.—See STREETS AND ALLEYS.

## HOMESTEAD.

minor children living with divorced wife, who has forfeited her rights, are entitled to share in homestead estate....	260
---	-----

## HUSBAND AND WIFE.

when evidence in suit for divorce is insufficient to establish the fact of marriage.....	347
in view of section 8 of the act on husband and wife, a husband acquires no interest in the wife's land from the fact of his having performed labor thereon.....	529

## ILLEGITIMATES.

one cannot claim estate of illegitimate as next of kin of mother if he must trace kinship through alien blood.....	504
the provisions of the Alien act of 1887 apply to the estates of illegitimates as well as legitimates.....	504
the act of 1874 supersedes all previous enactments concerning escheats, and applies to estates of illegitimates.....	505

## INDICTMENT.

an indictment for assault with intent to murder is insufficient which fails to allege the assault was felonious.....	408
when an indictment sufficiently charges attempt to obtain money by use of the confidence game.....	477
indictment framed under section 99 of Criminal Code, concerning confidence game, sufficiently apprises the accused of the nature and cause of the accusation.....	477

## INFANTS.—See MINORS.

## INJUNCTION.

if bill for injunction alone is without equity, court may, on denying motion for injunction, dismiss bill without permitting defendant to answer.....	186
when averments of bill to enjoin construction of sidewalk show that the improvement provided for in the ordinance is not unreasonable.....	186
equity will not relieve against special tax ordinance on the ground it is unreasonable or unjust, as there is an adequate remedy at law.....	186

INJUNCTION.—*Continued.*

	PAGE.
a benefit society cannot be required to perpetually perform a contract with reference to the location of its principal office in a certain city.....	215
use of street with consent of municipal authorities cannot be enjoined by an abutting owner .....	289
injunction will not lie where adequate remedy exists at law by way of a suit for damages.....	289
park commissioners may enjoin erection of piers by individuals upon submerged lands in Lake Michigan off the shore of Lincoln park, in Chicago.....	338
one whose right to unobstructed flow of water in ditch is a perpetual easement may have a mandatory injunction to compel removal of obstruction.....	372
private party must sustain special and irreparable injury to entitle him to enjoin obstruction of street.....	605
when street railway company cannot enjoin construction of sub-way by railroad company acting under track elevation ordinance.....	605
allegations of bill for injunction must not be uncertain with respect to the injury.....	605
when injunction will not be granted in order to avoid a multiplicity of suits.....	605

## INSPECTION OF MINES.—See MINES.

## INSTRUCTIONS.

omission from instruction of an essential element of recovery will not reverse, if other instructions include such element and require its presence.....	9
instruction barring plaintiff's recovery if he "did <i>any</i> careless or negligent act which materially contributed to his injury" is properly refused.....	10
instruction that jury may consider interest of specified witness is properly refused where there were other interested witnesses who testified.....	116
when refusal of instruction concerning effect of interest of witness upon his credibility cannot be complained of....	116
when assumption of question of fact will not reverse.....	116
when erroneous modification is not prejudicial.....	158
when giving of instruction ignoring matters of defense is not ground for reversal. ....	206
giving instruction which could not enlighten the jury is not reversible error, if it is of such a character as could not have affected the verdict.....	243
jury are presumed to consider the instructions as a whole and to notice the qualification one makes on another....	243

INSTRUCTIONS.—*Continued.*

	PAGE.
variance or insufficiency of proof is not ground for an instruction to jury to disregard certain counts under section 50 of Practice act.....	340
peremptory instruction to find for defendant must be refused if there is sufficient evidence to go to the jury and support a verdict when rendered.....	340
instruction impliedly suggesting that testimony of certain witnesses on testator's sanity is entitled to greater weight than that of subscribing witnesses is erroneous.....	400
instruction that will is invalid if made under influence of partial insanity is misleading, where there is no evidence upon which it can be based.....	401
instruction in will contest, concerning reasonableness of testator's disposition of property, construed as erroneous.	401
instructions for People in murder trial may be framed on theory that the killing was murder, if consistent with the evidence and question of manslaughter is fully presented.	544
instruction that accused must "satisfactorily" rebut People's case is ground for reversal.....	544

## INSURANCE.—See BENEFIT SOCIETIES.

attempting to board a moving car just after the train has started is not, as a matter of law, "voluntary exposure to unnecessary danger".....	111
whether attempt to board moving train was obviously dangerous is a question for the jury, in a suit to recover on the deceased's accident policy.....	111
necessary danger includes more than inevitable or unavoidable danger.....	111
a binding contract of insurance is not effected if there is neither delivery of the policy, payment or tender of the premium, or promise to pay the same.....	158
courts lean to that construction of an insurance policy which will afford the insured indemnity.....	575
when a fire policy will embrace fixtures in building though some of them are covered by other insurance.....	575
the amount of damages awarded on a fire policy is not reviewable in Supreme Court, when presented as a question of fact on appeal from Appellate Court.....	575

## INTEREST.

an averment that note bore interest at "six per cent per annum" is not at variance with proof of a note bearing "interest at six per".....	411
proof that note bore "interest at six per" warrants finding by jury that interest was six per cent per annum.....	411

## INTERPLEADER.

PAGE.

interpleading claimant of attached property may prove his own acts of ownership tending to show a change in character of his previous possession as agent..... 120

## JUDGMENTS AND DECREES.

an order to give bond for costs, for failure to comply with which the suit is dismissed, is a final order, from which an appeal may be taken..... 331

judgment of Appellate Court reversing judgment and remanding cause for further proceedings is not a final judgment, from which an appeal will lie..... 392

when judgment against one partner on joint note does not release the other, under section 11 of the Practice act.. 625

## JUDICIAL SALES.

execution sale, under section 39 of Judgment act, of land of decedent is invalid, where notice to resident heir is left with a member of the family..... 170

plaintiff in ejectment who relies for title on a sale under section 39 of Judgment act, must show that notice was served as required by statute..... 170

## JURISDICTION.

affidavit of service does not confer jurisdiction when sworn to before foreign notary, whose authority to administer oaths is not made to appear..... 129

recital in partition decree that notice of suit was published for thirty days does not establish jurisdiction, under sections 12 and 13 of the Chancery act..... 129

parties who appear, plead and submit to the jurisdiction of the court over their persons cannot thereafter question it. 351

objection of want of jurisdiction in assessment case because of absence of improvement petition is not waived by filing of other objections to confirmation..... 416

objection of want of jurisdiction over the subject matter may be made at any time, by motion to dismiss as well as by plea. .... 416

when statement in an affidavit for attachment of non-residence of defendant corporation is sufficient..... 582

when misstatement in attachment notice of time for appearing in court is not fatal to jurisdiction ..... 582

that attachment bond was signed by one partner, only, as principal, does not go to the jurisdiction of the court over the attachment proceeding..... 582

JURY.—See LAW AND FACT.

181—13

## LANDLORD AND TENANT.—See LEASES.

LAW AND FACT.	PAGE.
question whether plaintiff was guilty of contributory negligence is for the jury, if the minds of fair men would differ in their conclusions on that point.....	9
mixed questions of law and fact in suits at law are settled by the judgment of the Appellate Court.....	31
attempting to board moving car just after train has started is not, as a matter of law, "voluntary exposure to unnecessary danger".....	111
whether attempt to board moving train was obviously dangerous is a question for the jury in a suit on deceased's accident policy.....	111
whether one prosecuted for violating a license ordinance is an "itinerant merchant" or a "transient vendor of merchandise" is a question settled in Appellate Court.....	151
whether a deceased member of a benefit society was in good standing is a question of fact settled by the judgment of the Appellate Court. ....	206
master's approved finding of fact will stand, on appeal, unless clearly incorrect.....	350
one cannot complain, on appeal, of a finding of fact which has no bearing on the issue.....	350
when findings of fact that certain defendants were non-residents and insolvent cannot be complained of.....	351

## LEASES.

a lease of premises for "saloon" purposes is not <i>ultra vires</i> a corporation organized to manufacture and sell soda water. 622	
when lease for "saloon" purposes by corporation is not void, so as to excuse payment of rent, though corporation sells liquor in excess of its charter power.....	622

## LEGISLATURE.

legislature has the power to enact curative laws, such as it might originally have authorized.....	214
--	-----

## LEVY.

interest of child under a will is not subject to levy and sale as real estate, where, by the terms of the will, there is an equitable conversion into money.....	182
a warehouseman has no property in stored grain which is subject to levy and sale.....	564
owner of goods may, after demand, maintain trover against an officer for conversion of goods levied upon and sold under execution against third person.....	564

## LICENSE.

when parol license to construct drain is irrevocable..... 372

## LIENS.—See MORTGAGES.

## LIMITATIONS.

proof of payment of taxes under color of title must be clear and convincing, as it defeats the paramount title..... 382  
 payment of taxes on vacant land, under section 7 of Limitation act, must be followed by possession after the full period of payment..... 382  
 possession, after payment of taxes on vacant property under section 7 of Limitation act, must be taken by one who holds the color of title..... 382  
 what not such possession of land as is necessary to complete the bar of section 7 of Limitation act..... 383  
 title to accretions may be acquired by adverse possession of the adjoining land, under the Statute of Limitations. 426  
 possession of part of tract under color of title is possession of the entire tract described in the color relied upon.... 426  
 possession of a dwelling house and land by a widow under her statutory right is not adverse to the heirs..... 529

## LOAN ASSOCIATIONS.

a loan association cannot trade in real estate except as authorized by statute, in case of buying in property in which it has an interest..... 35  
 a contract by a loan association to purchase real estate in which it has no interest is not enforceable..... 35  
 deficiency decree cannot be rendered against loan association on foreclosure of mortgage assumed in purchasing property in which it had no interest..... 35

## MANDAMUS.

*mandamus* will lie to enforce payment of a claim by a sanitary district only when the claim is ascertained to be due. 334  
*mandamus* will not lie to compel payment by a sanitary district of a claim ordered paid by the board upon execution of receipt in full, where such condition is not performed. 334  
*mandamus* should not be resorted to to compel a master in chancery to execute a deed to purchaser on foreclosure. 421

## MARRIAGE.

when evidence in suit for divorce is insufficient to establish the fact of marriage..... 347

## MARSHALING OF SECURITIES.

when payee of dishonored check is entitled to relief under bill to marshal securities..... 279

## MASTER AND SERVANT.

	PAGE.
statute requiring mine owners to keep props and timbers on hand does not supersede common law obligations of mine owners toward their servants.....	10
when questions of assumed risk and contributory negligence by injured servant are for the jury.....	366
when servant is not, as a matter of law, chargeable with contributory negligence.....	366
liability of mine owners for violation of statute to protect miners, passed in obedience to constitution, does not depend on absence of contributory negligence by miner...	495
servant may presume that master's statements as to the safety of his place of work are true, in absence of anything to put him on inquiry.....	549
it is the master's duty to impart his knowledge of special danger to his servant.....	549

## MASTERS IN CHANCERY.

<i>mandamus</i> should not be resorted to to compel a master to execute a deed to the holder of a certificate of purchase.	421
--	-----

## MENTAL CAPACITY.—See WILLS.

## MERGER.

when judgment against one partner on joint note does not merge the joint demand so as to release the other. ....	625
--	-----

## MINES.

statute requiring mine owners to keep props and timbers on hand does not supersede common law obligations of mine owners toward their servants.....	10
mine inspection fees are not taxes, but are imposed as compensation for presumably beneficial services. ....	270
provision of section 11 of the act on mines, requiring mine owners to pay inspection fees, is a valid exercise of police power, and is constitutional.....	270
section 29 of article 4 of constitution, requiring legislation to protect miners, does not deprive legislature of right to impose inspection fees. ....	270
failure of Mine Inspection act to limit number of inspections per year does not authorize such frequent inspections as amount to a "taking of property".....	271
liability of mine owner for violation of statute to protect miners, passed in obedience to constitution, does not depend on absence of contributory negligence by miner....	495

## MINORS.

minor children living with divorced wife, who has forfeited her rights, are entitled to share in the homestead estate.	260
--	-----

## MODERN WOODMEN.—See BENEFIT SOCIETIES.

MORTGAGES.'	PAGE.
deficiency decree cannot be rendered against loan association on foreclosure of mortgage assumed in purchasing property in which it had no interest.....	35
partition of mortgaged property lying in two counties—effect of release, as to mortgagor's undivided interest, upon lien created by the decree.....	64
public dedication by mortgagor, without consent of mortgagee, fails if latter acquires title on foreclosure.....	396
a junior judgment creditor cannot be deprived of his statutory right to redeem by being joined as a party on foreclosure against the debtor.....	421
a judgment creditor may redeem within fifteen months, although he obtained a deed from the mortgagors after expiration of twelve months.....	421
when a second mortgagee is entitled to a continuation of the receivership under a sale on foreclosure of the first mortgage.....	440
chattel mortgage not void, under act of 1895, for failure of note to state that it is secured by chattel mortgage, unless the note has been assigned.....	448
the right of a mortgagee to take possession under the insecurity clause is not arbitrary, but must be based upon grounds amounting to probable cause.....	449
in replevin against mortgagee, the latter may show, in defense, that probable cause existed for believing the debt insecure before he took the chattels.....	449
a stipulated solicitor's fee may be allowed on foreclosure, in absence of evidence of unreasonableness.....	456
when receiver of rents and profits during foreclosure should be discharged .....	554
under what facts a mortgagor is not entitled to have receivership for rents and profits continued, as against the holder of equity of redemption.....	554
receivership for rents and profits should not be continued to enable receiver to pay taxes not legally due until after expiration of period of redemption .....	554
discharge of receiver without directing payment of costs of receivership is not error, if there is nothing in the record to show such costs were not paid.....	555
when evidence of gift of land by mortgagor is competent against him in proceeding to foreclose mortgage subsequently given by him on the land .....	570
when mortgage is subject to the title of the occupant of the premises.....	570

MUNICIPAL CORPORATIONS.—See SPECIAL ASSESSMENTS.	
when assumption, by instruction, that city had notice of defect in sidewalk will not reverse.....	116
city's negligent act may be the proximate cause, though particular injury and manner it occurred might not have reasonably been expected to flow therefrom.....	117
city not liable for costs in suit to enforce ordinance.....	151
ordinance imposing license fee on an "itinerant merchant or transient vendor of merchandise" construed.....	151
whether one prosecuted for violating a license ordinance is an "itinerant merchant or a transient vendor of merchandise" is a question settled in the Appellate Court.....	151
city cannot sue in its own name on a contract to locate head office of corporation in the city in consideration of donations by its citizens.....	215
city holds public streets exclusively for public use.....	289
city may establish public hack stands in street in front of railroad depots.....	289
use of street with consent of municipal authorities cannot be enjoined by abutting owner.....	289
annexation proceeding begun after the filing of a petition for an election for village organization is illegal.....	315
mayor <i>pro tem</i> cannot appoint city marshal if mayor is in city and not disabled from acting as mayor generally.....	460

MURDER.—See CRIMINAL LAW.

MUTUAL INSURANCE.—See BENEFIT SOCIETIES.

NEGLIGENCE.

question whether plaintiff was guilty of contributory negligence is for the jury, if the minds of fair men would differ in their conclusions on that point.....	9
instruction barring plaintiff's recovery if he "did <i>any</i> careless or negligent act which materially contributed to his injury" is properly refused.....	10
statute requiring mine owners to keep props and timbers on hand does not supersede common law obligations of the mine owners toward their servants. ....	10
negligent act may be proximate cause, though particular injury and manner it occurred might not have reasonably been expected to flow therefrom .....	117
evidence that crossing where injury occurred was in a populous part of city is competent in suit for negligence.....	323
height to which plaintiff's intestate was thrown by train is competent, as bearing upon question of rate of speed at which the train was running.....	323

NEGLIGENCE.—*Continued.*

	PAGE.
testimony that the train was running "fast" is competent, though witness cannot state speed in miles per hour.....	323
when count in action for negligence is not so faulty as to warrant an instruction to jury to disregard it, under section 50 of Practice act.....	340
when questions of assumed risk and contributory negligence by injured servant are for the jury.....	366
facts under which servant is not, as a matter of law, chargeable with contributory negligence.....	366
liability of mine owner for violation of statute to protect miners, passed in obedience to constitution, does not depend on absence of contributory negligence by miner....	495
avertment of due care by plaintiff is surplusage, where declaration charges willful violation of statutory duties....	495
servant may presume that master's statements as to the safety of his place of work are true, in absence of anything to put him on inquiry.....	549
it is the master's duty to impart his knowledge of special danger to his servant.....	549

## NOTARIES PUBLIC.

the power to administer oaths is not incidental to the office of notary public, but depends upon statutory enactment.	129
certificate under seal by a foreign notary is not <i>prima facie</i> evidence of authority to administer oaths, unless fact of such authority is recited therein.....	129
affidavit of service does not confer jurisdiction if sworn to before a foreign notary, whose authority to administer oaths is not made to appear. ....	129

## NOTICE.

one dealing with a corporation of limited powers is chargeable with notice of such limitation.....	35
notice of contract to convey land, which is void under the Statute of Frauds, does not affect subsequent purchaser from the proposed vendor.....	465
when mortgage is subject to title of occupant of premises.	570
when notice of publication in attachment is sufficient to confer jurisdiction.....	583
the mere copy of a contract is not entitled to record, as it has no legal force and is not an instrument of which the law takes notice.....	633
the record of an unsigned copy of a contract is not constructive notice.....	633
what not such possession of premises as constitutes notice of possessor's equities.....	633
when notice to agent cannot be imputed to his principal..	633

## OATH.

	PAGE.
the power to administer oaths is not incidental to the office of notary public, but the same depends entirely upon statutory enactment.....	129
certificate of foreign notary, under seal, is not <i>prima facie</i> evidence of his authority to administer oaths, unless fact of such authority is recited therein .....	129

## OPTIONS.—See GAMING.

## ORDINANCES.—See SPECIAL ASSESSMENTS.

recital in assessment ordinance that improvement petition was presented to municipal authorities is <i>prima facie</i> evidence of such jurisdictional fact.....	136
when original ordinance for assessment is sufficient basis for a second assessment proceeding after first assessment has been annulled.....	136
assessment ordinance need not refer to prayer of improvement petition as to manner in which the improvement is to be paid for.....	136
ordinance requiring license by an "itinerant merchant or transient vendor of merchandise" construed.....	151

## PARKS.

park commissioners may enjoin erection of piers by individuals upon submerged lands of Lake Michigan off the shore of Lincoln park, in Chicago.....	338
---	-----

## PARTIES.

when court, on motion in arrest, may permit plaintiff to amend declaration by adding as defendants names of new parties who appeared and defended suit.....	154
heirs to whom a legal title held by their ancestor in trust has descended are necessary parties to a proceeding to divest them of such title.....	248

## PARTITION.

partition of mortgaged property lying in two counties—effect of release, as to mortgagor's undivided interest, upon lien created by the decree.....	64
recital in partition decree that notice of suit was published for thirty days does not establish jurisdiction, under sections 12 and 13 of Chancery act.....	129

## PARTNERSHIP.

when judgment against one partner on joint note does not release the other, under section 11 of the Practice act...	625
---	-----

## PENALTIES.

	PAGE.
right of stranger, under section 132 of the Criminal Code, to sue for treble sum lost in gaming if loser does not sue, extends to gambling in grain options .....	199
severity of penalty imposed by statute against gambling furnishes no reason against its enforcement.....	199
the word "penalty," used in a contract, <i>prima facie</i> excludes the idea of stipulated damages, but is not conclusive....	583
a sum named in a contract as damages for its breach is a penalty, if the contract is indefinite and uncertain.....	583
a sum agreed to be paid in case of failure to promptly de- liver articles is a penalty, if it greatly exceeds the actual damages resulting from the delay.....	583

## PLATS.

under the Revised Statutes of 1845 an attempted dedication was ineffectual where each owner did not personally ac- knowledge the plat.....	396
--	-----

## PLEADING.

failure of declaration by injured servant to allege reliance upon master's promise to repair is cured, after verdict, by pleading over .....	9
matters in confession and avoidance of a special defense set up by plea should be made by replication, and not by amendment of the declaration .....	132
under what facts a plea in <i>quo warranto</i> against drainage commissioners is cured by verdict.....	177
if bill for injunction alone is without equity, court may, on denying motion for injunction, dismiss the bill without permitting defendant to answer .....	186
when averments of bill to enjoin construction of sidewalk show that the improvement provided for in the ordinance is not unreasonable.....	186
a general demurrer which fails to point out any defects in the bill is properly overruled if the bill has equity.....	195
it is not sufficient to charge fraud generally with reference to a transaction, but complainant must allege the spe- cific acts relied upon.....	195
when allegation of fraud in bill to remove cloud is sufficient to warrant relief.....	195
heirs to whom a legal title held by their ancestor in trust has descended are necessary parties to a proceeding to divest them of such title.....	248
an allegation that the grantors in a trust deed did not com- prehend the effect of their deed must be accompanied by an allegation of accident or mistake.....	249

PLEADING.— <i>Continued.</i>	PAGE.
variance or insufficiency of proof is not ground for instruction to jury to disregard certain counts as faulty, under section 50 of Practice act .....	340
when count in action for negligence is not so faulty as to be disregarded under section 50 of Practice act.....	340
general demurrer to declaration containing common and special counts should be overruled if former are good....	392
an indictment for assault with intent to murder is insufficient which fails to allege the assault was felonious.....	408
an averment that note bore interest at "six per cent per annum" is not at variance with proof of a note bearing "interest at six per" .....	411
when amendment to be inserted in each count of declaration sufficiently indicates the part to be amended.....	411
the answer is to be taken as true when case is submitted for hearing on bill and answer.....	440
when Statute of Frauds is sufficiently pleaded.....	465
when an indictment sufficiently charges attempt to obtain money by use of the confidence game .....	477
averment of due care by the plaintiff is surplusage where declaration charges willful violation of statutory duties. 495	495
allegations of bill for injunction must not be uncertain with respect to the injury.....	605
a general demurrer reaches all defects in a plea in abatement, whether in substance or form.....	625
a plea in abatement which merely recites the averments of count without anything <i>dehors</i> the record is demurrable..	625
where a plea in abatement and replication are both bad, a demurrer to the replication should be carried back to the plea, but no further.....	625

## POSSESSION.

proof of possession under claim of ownership is <i>prima facie</i> evidence of ownership in the claimant.....	149
proof of the execution of a deed without proof of possession does not prove title.....	149
proof that grantee's grantors were in possession claiming ownership when they conveyed raises a presumption of title in him.....	154
when presumption of ownership from possession of personal property cannot prevail.....	210
payment of taxes on vacant land, under section 7 of Limitation act, must be followed by possession after the full period of payment.....	382
what is not such possession of land as is necessary to complete the bar of section 7 of Limitation act.....	383

POSSESSION.—*Continued.*

## PAGE.

possession, after payment of taxes on vacant land under section 7 of the Limitation act, must be taken by one who holds the color of title.....	382
possession of part of tract under color of title is possession of the entire tract described in the color relied upon.....	426
possession of a dwelling house and land by a widow under her statutory right is not adverse to the heirs.....	529
what not such possession of premises as constitutes notice of the possessor's equities.....	633

## POWER OF ATTORNEY.

existence of valid power of attorney will be presumed in favor of an "ancient deed" which purports to have been executed by an attorney in fact.....	529
--	-----

## PRACTICE.—See APPEALS AND ERRORS.

under rule 15 of Supreme Court, alleged errors or grounds for reversal cannot be first urged in reply brief.....	31
mixed questions of law and fact, in suits at law, are settled by the judgment of the Appellate Court.....	31
filings authenticated copy of judgment or decree appealed from does not satisfy requirement that authenticated copy of record shall be filed before second day of term... ..	162
court cannot permit complete record to be filed after second day of term, unless what purports to be a transcript of the record has been previously filed .. .. .. .. ..	162
a bill of exceptions cannot be taken to review a judgment of the Appellate Court made in the exercise of its jurisdiction as a court of error..... .. .. .. .. ..	162
appeal is properly dismissed if transcript of record, or what purports to be a transcript, is not filed in time..... .. .. .. .. ..	162
if bill for injunction alone is without equity, court may, on denying motion for injunction, dismiss bill without permitting defendant to answer..... .. .. .. .. ..	186
decree granting affirmative relief must be justified by the evidence preserved or by recitals of fact in the decree... ..	249
an order to give bond for costs, for failure to comply with which the suit is dismissed, is a final order, from which an appeal may be taken..... .. .. .. .. ..	331
refusal to permit complainant to prosecute as a poor person is not error, where affidavit states that complainant has no property exempt and is unable to give security... ..	331
a bill of exceptions is not incomplete because objects exhibited to the jury cannot be incorporated therein..... .. ..	358
a recital in the record of the Appellate Court cannot be contradicted by resort to its opinion..... .. .. .. .. ..	358

PRACTICE.—*Continued.*

	PAGE.
judgment of the Appellate Court reversing judgment and remanding the cause for further proceedings is not a final judgment, from which an appeal will lie.....	392
general demurrer to a declaration containing common and special counts should be overruled if the common counts are good.....	392
objection of want of jurisdiction over subject matter of an assessment may be made at any time, by a motion to dismiss as well as by plea.....	416
answer is to be taken as true when a cause is submitted for hearing on the bill and answer.....	440
objection that record is not complete is without force where it does not indicate that a reference to alleged missing portions is necessary.....	440
appeal lies to Appellate Court where only the construction of a statute, and not its validity, is involved.....	512

## PRESUMPTIONS.

proof that grantee's grantors were in possession claiming ownership when they conveyed raises a presumption of title in him.....	154
when presumption of ownership from possession of personal property cannot prevail.....	210
jury are presumed to consider instructions as a whole, and to notice the qualification one makes upon another.....	243
it is presumed that a circuit court of a foreign State is a court of record.....	267
in absence of evidence to contrary it will be presumed, on appeal, that coroner required testimony to be written out and signed, as provided by law.....	323
existence of valid power of attorney will be presumed in favor of an "ancient deed" purporting to have been executed by an attorney in fact.....	529

## PRINCIPAL AND AGENT.

when notice to agent cannot be imputed to his principal..	633
---	-----

## PROCESS.

affidavit of service does not confer jurisdiction when sworn to before foreign notary, whose authority to administer oaths is not made to appear .....	129
recital in partition decree that notice of suit was published for thirty days does not establish jurisdiction, under sections 12 and 13 of Chancery act.....	129
written notice to heir, of a sale of decedent's land, under section 39 of Judgment act, cannot be served on resident heir by leaving copy with member of family.....	170

## PROPOSITIONS OF LAW.

## PAGE.

- a proposition asked to be held as the law of the case is properly refused when it ignores part of the evidence... 173
- a proposition of law not applicable to the facts as found by the court is properly refused..... 173
- a party cannot complain, on appeal, of a correct modification of his proposition of law, which proposition might have been refused..... 575

## PROXIMATE CAUSE.

- negligent act may be proximate cause though particular injury and manner it occurred might not have reasonably been expected to flow therefrom..... 117

## PUBLICATION.

- recital in partition decree that notice of suit was published for thirty days does not establish jurisdiction, under sections 12 and 13 of Chancery act ..... 129

## PUBLIC IMPROVEMENTS.—See SPECIAL ASSESSMENTS.

- recital in ordinance that improvement petition was presented to municipal authorities is *prima facie* evidence of such jurisdictional fact ..... 136
- recital in an ordinance that improvement petition was presented to municipal authorities is sufficient, though contents of such petition are not stated..... 136
- when original ordinance for assessment is sufficient basis for new assessment proceeding after first assessment has been annulled ..... 136
- improvement ordinance need not refer to the prayer of the improvement petition as to the manner in which the improvement is to be paid for..... 136
- the improvement of two parallel strips of boulevard connected by cross-streets is not a double improvement..... 136
- agreement that property shall be assessed a certain sum, only, on account of building restrictions, is not binding after owner obtains decree removing restrictions..... 136
- equity will not relieve against a special tax ordinance on the ground it is unreasonable or unjust, as there is an adequate remedy at law..... 186
- a paving ordinance is invalid which fails to indicate the height of the curb..... 242
- assessment ordinance passed without the property owners' petition required by the act of 1897 is void..... 416
- objection of want of jurisdiction because of absence of improvement petition is not waived by filing of other objections to the confirmation..... 416

## QUO WARRANTO.

PAGE.

under what facts a defective plea in *quo warranto* against  
drainage commissioners is cured by verdict..... 177  
in *quo warranto* to test title of respondent to office it is im-  
material whether any other person has title to the office. 460

## RAILROADS.—See STREET RAILWAYS.

city may establish public hack stands in street in front of  
railroad depots..... 289  
a railroad company is powerless to grant exclusive hack  
privileges in street beyond the limits of its own property. 289  
evidence that crossing where an injury occurred was in a  
populous part of city is competent in suit for damages.. 323  
testimony that train was going "fast" is competent though  
witness cannot state speed in miles per hour..... 323  
height to which plaintiff's intestate was thrown by train is  
competent, as bearing upon the question of rate of speed  
at which train was running..... 323  
witness who crossed track just ahead of plaintiff's intestate  
may testify as to condition of gates when he passed..... 323  
in elevating tracks under city ordinance railroad company  
should construct sub-ways high enough to permit passage  
of ordinary street cars and vehicles..... 605  
when street railway company cannot enjoin construction  
of sub-way by railroad company acting under track ele-  
vation ordinance..... 605

## REAL PROPERTY.—See DESCENT; WILLS.

an instrument in writing cannot pass title to real estate  
as a will unless signed and witnessed as provided by law. 49  
trust deed containing granting words *in presenti* is not ren-  
dered testamentary because of reservations respecting  
use of property during grantor's life..... 50  
proof of possession under claim of ownership is *prima facie*  
evidence of ownership in the claimant..... 149  
proof of the execution of a deed without proof of posses-  
sion does not prove title..... 149  
proof that grantee's grantors were in possession claiming  
ownership when they conveyed raises a presumption of  
title in him. ..... 154  
interest of child under a will is not subject to levy and sale  
as real estate, where, by the terms of the will, there is  
an equitable conversion into money..... 182  
a trustee's interest in real estate is commensurate with his  
powers thereover..... 248  
the legal title held by a trustee descends to his heirs subject  
to the trust, and does not remain in abeyance nor vest in  
a court of equity..... 248

REAL PROPERTY.—*Continued.*

## PAGE.

a trust is not passive if the trustee is required to convey title upon the happening of a contingency.....	248
a voluntary trust created for the settlor's benefit may be enforced without further consideration.....	248
a devise of lands to "the school" of a certain town, to be held in trust, does not vest title in township trustees, under the act of 1841 then in force.....	255
minor children living with divorced wife, who has forfeited her rights, are entitled to share in the homestead estate. in view of section 8 of the act on husband and wife, a husband acquires no interest in his wife's land from the fact that he has performed labor thereon.....	260 529
title passes upon delivery of deed to grantee though deed is returned to grantor, to be held for an outside purpose.	570

## RECEIVERS.

when second mortgagee is entitled to continuation of receivership under sale on foreclosure of first mortgage...	440
when a receiver for rents and profits during foreclosure should be discharged.....	554
under what facts a mortgagor is not entitled to have a receivership, pending a foreclosure, continued, as against the owner of equity of redemption.....	554
receivership for rents and profits should not be continued to enable receiver to pay taxes not legally due until after expiration of redemption period.....	554
discharge of receiver without direction to pay costs of the receivership is not error, where there is nothing in the record to show such costs were not paid.....	555

## RECORDING LAWS.

the mere copy of a contract is not entitled to record, as it has no legal force and is not an instrument of which the law takes notice.....	633
the record of an unsigned copy of a contract is not constructive notice.....	633

## REDEMPTION.

a junior judgment creditor cannot be deprived of his statutory right to redeem by being joined as a party on foreclosure against the debtor.....	421
a judgment creditor may redeem within fifteen months, although he obtained a deed from the mortgagors after the expiration of twelve months.....	421

## RELEASE.—See MORTGAGES; SURETIES.

## REMAINDERS.

PAGE.
a remainder may be limited after the termination of a life estate given to first taker, with power to convey fee.... 514

## REPLEVIN.

PAGE.
in replevin against a mortgagee, the latter may show in defense that probable cause existed for believing the debt insecure before he took possession of the chattels.. 449

## RIGHTS AND REMEDIES.—See ACTIONS AND DEFENSES.

when payee of check is entitled to share in fund arising from drawee's sale of drawer's collateral .....	279
when payee of check is entitled to relief under bill to marshal securities .....	279
<i>mandamus</i> should not be resorted to to compel a master in chancery to execute a deed to the holder of a certificate of purchase.....	421

## RIPARIAN RIGHTS.

title to accretions may be acquired by adverse possession of adjoining land, upon which taxes are paid under claim and color of title.....	426
bar connecting with an island is an accretion to it, though the connecting land is sometimes submerged .....	426
title of riparian owner extends to the center thread of the main channel of the stream.....	426
riparian boundaries follow gradual changes in main channel of stream.....	426
declarations made by former owners disclaiming title to accretion are not admissible to prejudice title of grantee. 426	

## RIVERS.—See RIPARIAN RIGHTS.

## SALES.—See JUDICIAL SALES.

effect of warranty of quality and fitness by manufacturer. 582	
evidence of breach of warranty is competent though the article has been received and used.....	583
vendee cannot urge as an objection to the vendor's title a cloud which he has purposely caused to be placed thereon to embarrass the vendor.....	633
equity will not permit a vendee to take advantage of his own bad faith.....	633

## SALOONS.

the word "saloon" may or may not mean a place where intoxicating liquor is sold.....	622
a lease of premises for "saloon" purposes is not <i>ultra vires</i> a corporation organized to manufacture and sell soda water	622

SECONDARY EVIDENCE.—See EVIDENCE.

SERVICE OF PROCESS.—See PROCESS.

SOLICITORS' FEES.

	PAGE.
a stipulated solicitor's fee may be allowed on foreclosure, in absence of evidence of unreasonableness.....	456

SPECIAL ASSESSMENTS.

a recital in ordinance that improvement petition was pre- sented to municipal authorities is <i>prima facie</i> evidence of such jurisdictional fact.....	136
recital in ordinance that improvement petition was pre- sented to municipal authorities is sufficient, though con- tents of such petition are not stated.....	136
when original ordinance is sufficient basis for second special assessment though first assessment was annulled.....	136
ordinance need not refer to the prayer of the improvement petition as to how the improvement is to be paid for.....	136
improvement of two connected parallel strips of boulevard, separated by a parkway, is not a double improvement.....	136
agreement that property shall be assessed a certain sum, only, on account of building restrictions, is not binding after owner obtains decree removing such restrictions..	136
a paving ordinance is invalid which fails to indicate the height of the curb.....	242
assessment ordinance passed without the property owners' petition required by act of 1897 is void.....	416
objection of want of jurisdiction in assessment case because of absence of improvement petition is not waived by filing other objections to confirmation.....	416
objection of want of jurisdiction over subject matter of as- sessment may be made at any time, by motion to dismiss as well as by plea.....	416

SPECIAL LEGISLATION.

any law attempting to prescribe conditions for admission to the bar must be general, and its classification must have a reasonable basis and not be arbitrary.....	73
proviso to section 1 of act of 1899, on admission to the bar, is unconstitutional, being special legislation, based on an arbitrary and unreasonable classification.....	73

SPECIFIC PERFORMANCE.

to satisfy the Statute of Frauds a contract to convey land must be in writing, and not rest partly in parol.....	464
part performance, in order to take a contract out of the Statute of Frauds, must have been under the contract re- lied upon, and not under other claim of title.....	464

SPECIFIC PERFORMANCE.— <i>Continued.</i>	PAGE
oral contract to convey land must be clearly established where the Statute of Frauds is pleaded.....	464
under what circumstances verbal contract to convey land will be enforced.....	570
when evidence of gift of land by mortgagor is competent against him in proceeding to foreclose mortgage subsequently given by him on the land.....	570
a vendee cannot urge as an objection to the vendor's title a cloud which he has purposely caused to be placed thereon to embarrass the vendor.....	633
equity will not permit a vendee to take advantage of his own bad faith.....	633
when equity will not retain bill for specific performance to assess damages for breach of the contract to convey....	633

## STATUTE OF FRAUDS.

if a trust is clearly manifested, though incidentally, it is immaterial that the writing was not executed for the express purpose of declaring the trust.....	22
when trust is sufficiently manifested in deposition filed by the declarant in a proceeding to set aside his deed.....	22
oral contract to convey land must be clearly established where the Statute of Frauds is pleaded.....	464
to satisfy the statute a contract to convey land must be in writing, and not rest partly in parol.....	464
when oral contract to convey land is uncertain.....	464
part performance, in order to take a contract out of the statute, must be under the contract relied upon, and not under other claim of title.....	464
notice of a contract to convey land, which is void under the statute, does not affect a subsequent purchaser from the proposed vendor.....	465
when Statute of Frauds is sufficiently pleaded.....	465
defense of Statute of Frauds cannot be raised on appeal when not presented below in any manner.....	570

## STATUTE OF LIMITATIONS.—See LIMITATIONS.

STATUTES.—See CONSTITUTIONAL LAW; CONSTRUCTION.	
courts will give a statute prospective operation, only, if the intention of the legislature in that respect is doubtful.	73
the legitimate office of a proviso is to limit or qualify the enacting clause, and not to enlarge it.....	73
the act of 1899, concerning admission to the bar, has prospective operation only.....	73
it is a sufficient compliance with the constitution if the title of an act suggests its subject matter.....	214

STATUTES.—*Continued.*

	PAGE.
a statute is not special legislation merely because it is directed to a particular subject.....	214
legislature may enact curative laws such as might have originally been authorized .....	214
object of statute and evil to be remedied by it may be considered in determining whether a thing within the letter of the statute is within its meaning .....	448
in case of doubt, a construction upholding a provision is preferred to one which will render it invalid as not embraced within the title of the act.....	448
terms used in a statute without explanation as to their meaning are given their common law significance. ....	504
repeals by implication are not favored .....	521
when subsequent general law does not repeal prior special law on same general subject.....	521

## STREAMS.—See RIPARIAN RIGHTS.

## STREET RAILWAYS.

a street railway company may complain of obstruction of street which prevents running of its cars.....	605
in elevating tracks under city ordinance a railroad company should construct sub-ways high enough to permit passage of ordinary street cars and vehicles.....	605
when street railway cannot enjoin construction of sub-way by railroad company under track elevation ordinance...	605

## STREETS AND ALLEYS.

city holds streets exclusively for public use.....	289
city may establish public hack stands in street in front of railroad depots.....	289
railroad company is powerless to grant special hack privileges in street beyond the limits of its own property....	289
use of street with the consent of municipal authorities can not be enjoined by an abutting owner.....	289
a public dedication by a mortgagor, without the consent of the mortgagee, fails when the latter acquires title on foreclosure.....	396
when owner of land is not estopped to deny validity of dedication for highway purposes by acts of the parties from whom she derived title... ..	396
in elevating tracks under city ordinance a railroad company must construct sub-ways high enough to permit the passage of ordinary street cars and vehicles.....	605
private party must sustain special and irreparable injury to entitle him to enjoin obstruction of street.....	605

## SUBROGATION.

	PAGE.
when payee of check is entitled to share in fund arising from drawee's sale of drawer's collateral.....	279
when the payee of a dishonored check is entitled to relief under bill to marshal securities.....	279

SUBSCRIBING WITNESSES.—See WITNESSES.

## SURETIES.

when maker of note is a competent witness in behalf of sureties after the payee's death.....	614
creditor has the burden of showing surety's full knowledge of the acts of the debtor and creditor relied upon by the surety as releasing him.....	614
agreement by creditor to extend time need not be based on a money consideration in order to have the effect of releasing the surety.....	614
payment of interest in advance will support a promise to extend time of payment—effect as evidence.....	614
payment of interest already due, upon promise to extend time, does not release surety.....	615
promise to extend time indefinitely and without considera- tion does not release surety.....	615
when surety is not released by extension of time .....	615

## SURVEYS.

monuments of the original survey are better evidence of the boundaries of city lots than field notes, maps or plats. 165
---

## SWAMP LANDS.

Auditor's certificate that specified lands within a county were ceded to it as swamp lands is made evidence of that fact by the act of 1854.....	266
--	-----

## TAX DEEDS.

a tax deed will be set aside as a cloud where the affidavit therefor falsely and fraudulently stated that the prem- ises were vacant and unoccupied.....	195
--	-----

## TAXES.—See SPECIAL ASSESSMENTS.

receivership for rents and profits should not be continued to enable the receiver to pay taxes not legally due until after expiration of period of redemption .....	554
---	-----

TESTAMENTARY CAPACITY.—See WILLS.

TOWNS.—See MUNICIPAL CORPORATIONS.

TRACK ELEVATION.—See RAILROADS.

TRANSCRIPT OF RECORD.—See PRACTICE.

TRESPASS.

verdict of \$100 in trespass against city for removing plaintiff's fence and injuring his trees held not excessive..... 396

TRIAL.

	PAGE.
failure of declaration by injured servant to allege reliance upon master's promise to repair is cured, after verdict, by pleading over.....	9
when court, on motion in arrest, may permit plaintiff to amend declaration by adding as defendants new parties, who appeared and defended the suit.....	154
written finding of jury put in proper form by court, read aloud to them and assented to by them is a verdict .....	207
when denial of motion for change of venue is not reviewable on appeal.....	215
court's refusal to sustain objections to improper questions will not reverse, if one question is not answered and a harmless reply is made to the other.....	243
jury are presumed to consider instructions as a whole, and to notice the qualification one makes upon another.....	243
objection to sufficiency of foundation for introduction of deed records must be raised in trial court.....	266
jury cannot disregard entire testimony of witness because he made a false statement as the result of forgetfulness or honest mistake.....	323
variance or insufficiency of proof is not ground for an instruction to jury to disregard certain counts as faulty, under section 50 of Practice act.....	340
when count is not so faulty as to permit jury to disregard it.	340
when motion to exclude evidence for variance is properly overruled.....	340
peremptory instruction to find for defendant must be refused if there is sufficient evidence to go to the jury and support a verdict.	340
when cross-examination of accused is not prejudicial, as tending to show his reputation after the crime.....	544
cross-examination of accused covering matters already in evidence concerning his past life is not error.....	544

TROVER.

owner of goods may, after demand, maintain trover against an officer for the conversion of goods taken on execution against third person..... 564

## TRUSTS.

	PAGE.
if a trust is sufficiently manifested, though incidentally, it is immaterial that the writing was not executed for the express purpose of declaring the trust.....	22
when trust is sufficiently manifested in deposition filed by the declarant in his own behalf in a proceeding to set aside his deed.....	22
when trust deed is not defeated or rendered testamentary because of reservations respecting the use of the property during the grantor's life.....	49
a trustee's interest in real estate is commensurate with his powers thereover.....	248
a trust is not passive if the trustee is required to convey title upon the happening of a contingency.....	248
the legal title held by a trustee descends to his heirs subject to the trust, and does not remain in abeyance or vest in a court of equity.....	248
a voluntary trust created for the settlor's benefit may be enforced without further consideration.....	248
a revoking clause is not essential to the validity of a trust deed creating a voluntary settlement.....	248
heirs to whom a legal title held by their ancestor as trustee has descended are necessary parties to proceeding to divest them of the title.....	248
a devise of lands to "the school" of a certain town, to be held in trust, does not vest title in township trustees, under the act of 1841 then in force.....	255

## ULTRA VIRES.

receiving benefits of contract may estop corporation from pleading <i>ultra vires</i> , if contract is within power of corporation but the power was improperly exercised.....	35
a contract beyond the power of a corporation is void, and estoppel to plead <i>ultra vires</i> cannot be based on fact that corporation received benefits.....	35

## UNDUE INFLUENCE.

suspicion attaching to transactions between persons in fiduciary relation is removed by evidence of fair dealing and absence of improper influence. ....	22
--	----

## VARIANCE.

variance or insufficiency of proof is not ground for instruction to jury to disregard certain counts as faulty, under section 50 of Practice act.....	340
when motion to exclude evidence for variance is properly overruled.....	340

	PAGE.
<b>VARIANCE.—Continued.</b>	
an averment that note bore interest at "six per cent per annum" is not at variance with proof of a note bearing "interest at six per".....	411
when exception to master's report is too general to raise the point of variance on appeal.....	456
<b>VENDOR AND PURCHASER.</b>	
vendee cannot urge as an objection to the vendor's title a cloud which he has purposely caused to be placed thereon to embarrass the vendor.....	633
equity will not permit a vendee to take advantage of his own bad faith.....	633
<b>VENUE.</b>	
prosecution for obtaining money by confidence game should be instituted where most of the overt acts were performed and the money was obtained.....	477
attempt to obtain money by confidence game is not proved by evidence showing the actual obtaining of the money, though in another county.....	477
<b>VERDICT.</b>	
written finding of jury put in proper form by court, read aloud to them and assented to by them is the verdict.....	207
<b>VESTED RIGHTS.</b>	
section 1 of Alien act of 1897 does not affect rights which have vested by way of escheat prior to passage of act...	505
<b>VILLAGES.—See MUNICIPAL CORPORATIONS.</b>	
<b>WAIVER.</b>	
objection of want of jurisdiction in assessment case because of absence of improvement petition is not waived by filing other objections to confirmation.....	416
<b>WAREHOUSES.</b>	
a warehouseman has no property in stored grain which is subject to levy and sale.....	564
title to grain merely stored in private warehouse does not pass to the warehouseman.....	564
<b>WARRANTY.</b>	
effect of warranty of quality and fitness by manufacturer. 582	
evidence of breach of warranty is competent though the article has been received and used.....	583

	PAGE.
WATERS.—See RIPARIAN RIGHTS.	
park commissioners may enjoin erection of piers by individuals upon submerged lands of Lake Michigan off the shore of Lincoln park, in Chicago.....	338
WILLS.	
an instrument in writing cannot pass title to real estate as a will unless signed and witnessed as required by statute. ....	49
a testator may sign will after subscribing witnesses, if he signs in the presence of the witnesses and as part of the same transaction.....	122
clause dividing property equally among testator's children is not in conflict with clause directing executor to sell land if children cannot agree on division.....	182
interest of child under a will is not subject to levy and sale as real estate, where, by the terms of the will, there is an equitable conversion into money.....	182
a devise of lands to "the school" of a certain town, to be held in trust, does not vest title in township trustees, under the act of 1841 then in force.....	255
inconsistent clauses—when rule that last clause will prevail is applicable.....	343
a restriction on power of alienation is void, as repugnant to a prior devise for life with power to convey the fee without limitation .....	343
former wills, made when the testator's sanity was unquestioned, are admissible on issue of mental capacity where they are substantially like the will in contest .....	400
instruction impliedly suggesting that testimony of certain witness on question of testator's sanity is entitled to more weight than that of subscribing witnesses is erroneous..	400
feebleness or partial unsoundness of mind does not necessarily destroy testamentary capacity.....	400
instruction that will is invalid if made under influence of partial insanity is misleading, where there is no evidence upon which it can be based.....	401
instruction in will contest, concerning reasonableness of testator's disposition of property, construed as erroneous. ....	401
a devise without words of inheritance is subject to construction, notwithstanding it complies with requirements of section 13 of Conveyance act.....	514
a remainder may be limited after the termination of a life estate given to first taker with power to convey the fee. ....	514
a general clause must give way to a specific one immediately following it and restricting its operation.....	514
when subsequent clause of will will not reduce prior devise of fee to a life estate.....	514

## WITNESSES.

	PAGE.
instruction that the jury may consider interest of specified witness is properly refused where there were other interested witnesses who testified.....	116
a testator may sign will after subscribing witnesses, if he signs in their presence and as part of the transaction...	122
jury cannot disregard entire testimony of witness because of a false statement made as the result of forgetfulness or honest mistake.....	323
when admission of improper evidence to impeach plaintiff's witness will work reversal.....	324
when maker of a note is a competent witness in behalf of sureties after the payee's death.....	614

## WORDS AND PHRASES.

sections 130 and 132 of Criminal Code construed, as to who is a "winner" in a grain gambling transaction.....	199
the word "penalty," used in a contract, <i>prima facie</i> excludes the idea of stipulated damages, but is not conclusive....	583
the word "saloon" may or may not mean a place where intoxicating liquor is sold.....	622



## TABLE OF CASES

COMPRISING THE FORMER DECISIONS OF THIS COURT, CITED, COMMENTED UPON OR EXPLAINED IN THIS VOLUME.

---

### A

	PAGE.
Abt v. American Trust and Savings Bank, 159 Ill. 467.....	282
Alden v. St. Peter's Parish, 158 Ill. 631.....	259
Alexander v. People, 96 Ill. 96.....	548
Ambrose v. Raley, 58 Ill. 506.....	542
Anderson v. Fruitt, 108 Ill. 378.....	395
Anderson v. Gray, 134 Ill. 550.....	157
Anderson v. McCormick, 129 Ill. 308.....	157, 150
Andrews v. Andrews, 110 Ill. 223.....	259
Appleton v. People, 171 Ill. 473.....	548
Aurora Fire Ins. Co. v. Eddy, 49 Ill. 106.....	580

### B

Baker v. Baker, 159 Ill. 394.....	63
Baker v. Copenbarger, 15 Ill. 103.....	184
Baltimore and Ohio and Chicago Ry. Co. v. I. C. R. R. Co. 137 Ill. 9. 166	
Banfill v. Twyman, 172 Ill. 123.....	152
Bank of the Republic v. County of Hamilton, 21 Ill. 53.....	229
Barber v. Whitney, 29 Ill. 439.....	393
Barger v. Hobbs, 67 Ill. 592.....	157
Barrows v. City of Sycamore, 150 Ill. 588.....	610, 307, 296
Bartlett Coal and Mining Co. v. Roach, 68 Ill. 174.....	504
Bastian v. Modern Woodmen, 166 Ill. 595.....	232, 227, 225, 215
Beavan v. Went, 155 Ill. 592.....	509, 508
Beesman v. City of Peoria, 16 Ill. 484.....	420
Benefield v. Albert, 132 Ill. 665.....	269
Bickerdike v. Allen, 157 Ill. 95.....	592
Bickford v. First Nat. Bank of Chicago, 42 Ill. 238.....	283
Bloomington, City of, v. Reeves, 177 Ill. 161.....	419
Board of Supervisors v. Magoon, 109 Ill. 142.....	143
Board of Supervisors v. Winnebago Drain. Co. 52 Ill. 454 and 299. 134	
Bobel v. People, 173 Ill. 19.....	452
Bonnell v. Holt, 89 Ill. 71.....	131

Boone <i>v.</i> Juliet, 1 Scam. 258 .....	79
Bowman <i>v.</i> Wettig, 39 Ill. 416 .....	157
Boynton <i>v.</i> Pierce, 151 Ill. 197 .....	425, 424
Braceville Coal Co. <i>v.</i> People, 147 Ill. 68 .....	80
Bradley <i>v.</i> Ballard, 55 Ill. 413 .....	624, 49, 46
Bradshaw <i>v.</i> Combs, 102 Ill. 428 .....	618
Bradwell, <i>In re</i> , 55 Ill. 535 .....	103, 94
Bright <i>v.</i> Bright, 41 Ill. 97 .....	474
Brown <i>v.</i> Leckie, 43 Ill. 497 .....	283
Brown <i>v.</i> Luehrs, 79 Ill. 575 .....	328
Brown <i>v.</i> Riggan, 94 Ill. 560 .....	405
Buck <i>v.</i> County of Hamilton, 99 Ill. 507 .....	395
Burns <i>v.</i> Edwards, 163 Ill. 494 .....	386
Burton <i>v.</i> Perry, 146 Ill. 71 .....	644
Buttenuth <i>v.</i> St. Louis Bridge Co. 123 Ill. 535 .....	438, 437
Butz <i>v.</i> Kerr, 123 Ill. 659 .....	525

## C

Calumet Iron and Steel Co. <i>v.</i> Martin, 115 Ill. 358 .....	500
Campbell <i>v.</i> Campbell, 63 Ill. 462 .....	131
Campbell <i>v.</i> People, 109 Ill. 585 .....	492
Campbell <i>v.</i> Whetstone, 3 Scam. 361 .....	592
Capek <i>v.</i> Kropik, 129 Ill. 509 .....	263
Capen <i>v.</i> DeSteiger Glass Co. 105 Ill. 185 .....	152, 32
Carpenter <i>v.</i> Calvert, 83 Ill. 62 .....	407
Carpenter <i>v.</i> People, 4 Scam. 197 .....	490
Carroll <i>v.</i> City of East St. Louis, 67 Ill. 588 .....	42
Carrollton, City of, <i>v.</i> Bazzette, 159 Ill. 284 .....	153
Carter <i>v.</i> City of Chicago, 57 Ill. 283 .....	312
Cashman, <i>In re Estate of</i> , 134 Ill. 88 .....	519
Catlett <i>v.</i> Young, 143 Ill. 74 .....	504
Chambers <i>v.</i> People, 105 Ill. 409 .....	406
Chicago and Alton R. R. Co. <i>v.</i> Clausen, 173 Ill. 100 .....	15
Chicago and Alton R. R. Co. <i>v.</i> Platt, 89 Ill. 141 .....	20
Chicago and Alton R. R. Co. <i>v.</i> Scanlan, 170 Ill. 106 .....	552
Chicago and Alton R. R. Co. <i>v.</i> Smith, 78 Ill. 96 .....	172
Chicago Artesian Well Co. <i>v.</i> Connecticut Life Ins. Co. 57 Ill. 424 .....	459
Chicago, Burl. and Quincy R. R. Co. <i>v.</i> Harwood, 90 Ill. 425 .....	15
Chicago, Burl. and Quincy R. R. Co. <i>v.</i> Perkins, 125 Ill. 127 .....	326
Chicago, Burl. and Quincy R. R. Co. <i>v.</i> Warner, 108 Ill. 538 .....	15
Chicago, City of, <i>v.</i> Phoenix Ins. Co. 126 Ill. 276 .....	80
Chicago, City of, <i>v.</i> Union Building Ass. 102 Ill. 379 .....	610
Chicago and Northwestern Ry. Co. <i>v.</i> Dunleavy, 129 Ill. 132 .....	326
Chicago, Peoria and St. Louis Ry. Co. <i>v.</i> Nix, 137 Ill. 141 .....	269
Chicago Public Stock Exchange <i>v.</i> McClaughry, 148 Ill. 372 .....	614
Chicago and Western Indiana R. R. Co. <i>v.</i> Ayres, 106 Ill. 511 .....	303
Church <i>v.</i> People, 179 Ill. 205 .....	147

## PAGE.

Cicero and Proviso Street Ry. Co. v. Meixner, 160 Ill. 320.....	15
Clark v. Clark, 122 Ill. 388.....	474
Clark v. Marfield, 77 Ill. 258.....	595
Clawson v. Munson, 55 Ill. 394 .....	457
Cleary v. Babcock, 41 Ill. 271.....	169
Clemmer v. Drovers' Nat. Bank, 157 Ill. 206 .....	311
Cloud v. Greasley, 125 Ill. 313.....	474, 473
Cohn v. People, 149 Ill. 486.....	453
Commercial Ins. Co. v. Robinson, 64 Ill. 265 .....	580
Commissioners of Drainage District v. People, 138 Ill. 87 .....	181
Commissioners v. Harper, 38 Ill. 103.....	143
Connor v. Town of West Chicago, 162 Ill. 287.....	137
Consolidated Coal Co. v. Scheiber, 167 Ill. 539.....	342, 19
Consolidated Coal Co. v. Wombacher, 134 Ill. 57.....	19
Consolidated Ice Machine Co. v. Keifer, 134 Ill. 481.....	329
Cook v. Cook, 104 Ill. 98.....	163
Cooke v. Murphy, 70 Ill. 96.....	618
Coombs v. Hertig, 162 Ill. 171.....	157
Corcoran v. Chicago, Mad. and North. R. R. Co. 149 Ill. 291.313, 297	
Corrington, Matter of, 124 Ill. 363.....	184
Coryell v. Klehm, 157 Ill. 462.....	134
Cothran v. Ellis, 125 Ill. 496.....	204
Covington v. City of East St. Louis, 78 Ill. 548.....	528
Cox v. People, 82 Ill. 191.....	489
Craig v. People, 47 Ill. 487.....	312
Craig v. Southard, 148 Ill. 37.....	403
Crerar v. Williams, 145 Ill. 625.....	259
Crittenden v. French, 21 Ill. 598.....	413
Cross v. Will County Nat. Bank, 177 Ill. 33.....	447
Crossman v. Wohlleben, 90 Ill. 537.....	620, 619
Culver v. People, 161 Ill. 89.....	188, 137
Culver v. Schroth, 153 Ill. 437.....	448
Cummings v. People, 50 Ill. 132.....	630
Cummings v. West Chicago Park Comrs. 181 Ill. 136.....	194
Cunningham v. Stein, 109 Ill. 375.....	247
Curtis v. People, Breese, 256.....	410, 409
Curtis v. People, 1 Scam. 285.....	409

## D

Dahnke v. People, 168 Ill. 102.....	93
Daniels v. Hilgard, 77 Ill. 640.....	274
Darst v. Gale, 83 Ill. 136.....	49, 47
Davis v. Dale, 150 Ill. 239.....	561, 559, 558, 446
Davis v. Howard, 172 Ill. 340.....	388
Day v. Porter, 161 Ill. 235.....	209
Decatur, City of, v. Niedermeyer, 168 Ill. 68.....	167
Derby v. Gage, 38 Ill. 27.....	445

Devlin <i>v.</i> People, 104 Ill. 504.....	118
DeWitt <i>v.</i> Bradbury, 91 Ill. 446.....	157
Diblee <i>v.</i> Davison, 25 Ill. 486.....	630
Dickison <i>v.</i> Dickison, 138 Ill. 541.....	520, 346
Dills <i>v.</i> Hubbard, 21 Ill. 328.....	431
Doan <i>v.</i> Mauzey, 33 Ill. 227.....	642
Doane <i>v.</i> Lake Street El. R. R. Co. 165 Ill. 510.....	313, 303, 299, 297
Dodge <i>v.</i> Wright, 48 Ill. 382.....	311
Dodgson <i>v.</i> Henderson, 113 Ill. 360.....	618
Dorn <i>v.</i> Geuder, 171 Ill. 362.....	458
Downing <i>v.</i> Mayes, 153 Ill. 330.....	542, 388
Drake <i>v.</i> Ogden, 128 Ill. 603.....	390
Drovers' Nat. Bank <i>v.</i> O'Hare, 119 Ill. 646.....	177
Dunlap <i>v.</i> Turner, 64 Ill. 47.....	630
Durkee <i>v.</i> People, 155 Ill. 354.....	45

**E**

Earll <i>v.</i> City of Chicago, 138 Ill. 277.....	398
East St. Louis, City of, <i>v.</i> Maxwell, 99 Ill. 439.....	526
Ebey <i>v.</i> Adams, 135 Ill. 80.....	184
Eckman <i>v.</i> Chicago, Burlington and Quincy R. R. Co. 169 Ill. 312.....	49
Egbers <i>v.</i> Egbers, 177 Ill. 82.....	369
Elson <i>v.</i> Comstock, 150 Ill. 303.....	399

**F**

Fanning <i>v.</i> Rogerson, 142 Ill. 478.....	395
Farmers' and Merchants' Ins. Co. <i>v.</i> Menz, 63 Ill. 116.....	393
Farrell <i>v.</i> Town of West Chicago, 162 Ill. 280.....	137
Farwell <i>v.</i> Lowther, 18 Ill. 252.....	473
Fell <i>v.</i> Young, 63 Ill. 106.....	542
Ferbrache <i>v.</i> Ferbrache, 110 Ill. 210.....	473
Ferris <i>v.</i> Commercial Nat. Bank, 158 Ill. 237.....	131
Field <i>v.</i> Barling, 149 Ill. 556.....	314, 313, 307, 296
Finucan <i>v.</i> Kendig, 109 Ill. 198.....	253
First M. E. Church of Chicago <i>v.</i> Dixon, 178 Ill. 260.....	42
First Nat. Bank <i>v.</i> Baker, 161 Ill. 281.....	253
First Nat. Bank <i>v.</i> Illinois Steel Co. 174 Ill. 140.....	447
Fisher <i>v.</i> Bennehoff, 121 Ill. 426.....	430
Flynn <i>v.</i> Mudd, 27 Ill. 323.....	619
Fordyce <i>v.</i> Shriver, 115 Ill. 530.....	445
Forsyth <i>v.</i> Warren, 62 Ill. 68.....	595
Fourth Nat. Bank <i>v.</i> City Nat. Bank, 68 Ill. 398.....	283
Fox, Town of, <i>v.</i> Town of Kendall, 97 Ill. 72.....	228
Freeland <i>v.</i> Board of Supervisors of Jasper County, 27 Ill. 303.	163
Freeman <i>v.</i> Easly, 117 Ill. 317.....	407, 405
Frizzell <i>v.</i> Rogers, 82 Ill. 109.....	143
Fuller <i>v.</i> Shedd, 161 Ill. 462.....	437

## G

	PAGE.
Gade <i>v.</i> Forest Glen Brick Co., 158 Ill. 39.....	395
Gage <i>v.</i> Hampton, 127 Ill. 87.....	388, 387, 385
Gage <i>v.</i> Schmidt, 104 Ill. 106.....	198
Gage Hotel Co. <i>v.</i> Union Nat. Bank, 171 Ill. 531.....	283, 282
Geer <i>v.</i> Goudy, 174 Ill. 514.....	470
German Nat. Bank <i>v.</i> Meadowcroft, 95 Ill. 124.....	566
Gesford <i>v.</i> Critzer, 2 Gilm. 698.....	332
Gibler <i>v.</i> City of Mattoon, 167 Ill. 18.....	356
Gilbreath <i>v.</i> Dilday, 152 Ill. 207.....	268
Giles <i>v.</i> Anslow, 128 Ill. 187.....	518
Glos <i>v.</i> Randolph, 133 Ill. 197.....	150
Goodwillie <i>v.</i> City of Lake View, 137 Ill. 51.....	420
Gosselin <i>v.</i> City of Chicago, 103 Ill. 623.....	398
Gosselin <i>v.</i> Smith, 154 Ill. 74.....	543
Goudy <i>v.</i> Hall, 36 Ill. 313.....	595
Gramer <i>v.</i> Joder, 65 Ill. 314.....	413
Green <i>v.</i> Oakes, 17 Ill. 249.....	611, 312
Gridley <i>v.</i> Hopkins, 84 Ill. 528.....	399
Gridley <i>v.</i> Watson, 53 Ill. 186.....	311
Griffin <i>v.</i> Johnson, 161 Ill. 377.....	437
Griffin <i>v.</i> Larned, 111 Ill. 432.....	209
Gross <i>v.</i> People, 95 Ill. 368.....	513
Gunnarsson <i>v.</i> City of Sterling, 92 Ill. 569.....	526
Gunnell <i>v.</i> Cockerill, 79 Ill. 79.....	63

## H

Haas <i>v.</i> Chicago Building Society, 89 Ill. 498.....	560
Hamlin <i>v.</i> United States Express Co. 107 Ill. 443.....	519
Hammond <i>v.</i> Carter, 155 Ill. 579.....	390
Harland <i>v.</i> Eastman, 119 Ill. 22.....	157, 150
Harms <i>v.</i> Kransz, 167 Ill. 421.....	391, 390
Harshbarger <i>v.</i> Carroll, 163 Ill. 636.....	63
Hawes <i>v.</i> City of Chicago, 158 Ill. 653.....	192
Hayack <i>v.</i> Will, 169 Ill. 145.....	263
Henderson <i>v.</i> Blackburn, 104 Ill. 227.....	519
Henderson <i>v.</i> Harness, 176 Ill. 302 .....	346
Henning <i>v.</i> Eldridge, 146 Ill. 305.....	395
Henrickson <i>v.</i> Reinback, 33 Ill. 299.....	393
Herbert <i>v.</i> Herbert, Breese, 354.....	157
Herr <i>v.</i> Payson, 157 Ill. 244 .....	25
Hertz <i>v.</i> Buchmann, 177 Ill. 553.....	537
Heuser <i>v.</i> Harris, 42 Ill. 425.....	259, 258
Hibbard & Co. <i>v.</i> City of Chicago, 173 Ill. 91.....	307, 296
Hickenbotham <i>v.</i> Blackledge, 54 Ill. 316.....	131
Hickey <i>v.</i> Forristal, 49 Ill. 255.....	311
Hill <i>v.</i> Bahrns, 158 Ill. 314.....	403

Hirth v. Lynch, 98 Ill. 409.....	208
Hobart v. Hobart, 154 Ill. 610.....	126
Hogue v. Corbit, 158 Ill. 540.....	592
Holden v. City of Chicago, 172 Ill. 263 .....	416, 242
Hollingsworth v. Koon, 113 Ill. 443.....	365
Holmes v. Holmes, 44 Ill. 168.....	473
Houck v. Yates, 82 Ill. 179.....	437
Hoyt v. Tuxbury, 70 Ill. 331.....	640
Huddleston v. Francis, 124 Ill. 195.....	79
Hunt v. Chicago Horse and Dummy Ry. Co. 121 Ill. 638.....	525
Hunt v. Devine, 37 Ill. 137.....	284
Hunt v. Fowler, 121 Ill. 269.....	259
Hurlbut v. Bradford, 109 Ill. 397.....	386
Hurlbut v. Kantzler, 112 Ill. 482.....	642
Hyde Park, Village of, v. Cemetery Ass. 119 Ill. 141.....	526

## I

Iglehart v. Jernegan, 16 Ill. 513.....	328
Illinois Central R. R. Co. v. Ashline, 171 Ill. 313.....	327
Illinois River R. R. Co. v. Zimmer, 20 Ill. 654.....	236
Indianapolis and St. Louis R. R. Co. v. Morgenstern, 106 Ill. 216.	32
Irwin v. Dyke, 114 Ill. 302.....	572

## J

Jameson v. Wallace, 167 Ill. 388.....	205, 204
Johnson v. Huling, 127 Ill. 14.....	150
Judy v. Sterrett, 153 Ill. 94.....	209

## K

Kadish v. Garden City Equitable Loan Ass. 151 Ill. 531.....	49, 47
Kankakee and Seneca R. R. Co. v. Horan, 131 Ill. 288.....	328
Kaufman v. Breckinridge, 117 Ill. 305 .....	518
Keefer v. Mason, 36 Ill. 406.....	131
Keith v. Keith, 104 Ill. 397.....	157
Keller v. Brickey, 78 Ill. 133.....	267
Kennedy v. Evans, 31 Ill. 258.....	618
Kennedy v. People, 122 Ill. 649.....	490
Kerfoot v. Billings, 160 Ill. 563.....	134
Kingman v. Higgins, 100 Ill. 319.....	264, 262
Kingsbury v. Burnside, 58 Ill. 310.....	30
Kirchoff v. Union Mutual Life Ins. Co. 128 Ill. 199.....	364
Kirk v. Elmer Dearth Agency, 171 Ill. 207.....	590
Kirkland v. Cox, 94 Ill. 400.....	252
Knefel v. Flanner, 166 Ill. 147.....	415
Knox County v. Davis, 63 Ill. 405 .....	311
Kreigh v. Sherman, 105 Ill. 49.....	32
Kruse v. Wilson, 79 Ill. 233 .....	592

## L

## PAGE.

Lagger <i>v.</i> Mutual Union Loan Ass.	146 Ill. 283.	264
Laird <i>v.</i> Warren, 92 Ill. 204.	34	
Lake Erie and Western R. R. Co. <i>v.</i> Scott, 132 Ill. 429.	303	
Lake Shore and Michigan Southern Ry. Co. <i>v.</i> Ward, 135 Ill. 511.	459	
Lake View, City of, <i>v.</i> MacRitchie, 134 Ill. 203.	599	
Lanark, City of, <i>v.</i> Dougherty, 153 Ill. 163.	209	
Lane <i>v.</i> Lesser, 135 Ill. 567.	643	
Lane <i>v.</i> Sharpe, 3 Scam. 566.	473	
Lawver <i>v.</i> Langhans, 85 Ill. 138.	592	
Leigh <i>v.</i> Mason, 1 Scam. 249.	420	
Ligare <i>v.</i> City of Chicago, 139 Ill. 46.	296	
Linnertz <i>v.</i> Dorway, 175 Ill. 508.	186	
Litchfield Coal Co. <i>v.</i> Taylor, 81 Ill. 590.	504	
Live Stock Commission Co. <i>v.</i> Live Stock Exchange, 143 Ill. 210.	190	
Loehr <i>v.</i> People, 132 Ill. 504.	486	
Loomis <i>v.</i> Riley, 24 Ill. 307.	69	
Loverin <i>v.</i> McLaughlin, 161 Ill. 417.	241	
Luetgert <i>v.</i> Volker, 153 Ill. 385.	328	
Lynch <i>v.</i> Jackson, 123 Ill. 360.	364	

## M

Magee <i>v.</i> Magee, 51 Ill. 500.	311
Maher <i>v.</i> Lanfrom, 86 Ill. 513.	619
Maltby <i>v.</i> Thews, 171 Ill. 264.	641
Mann <i>v.</i> Martin, 172 Ill. 18.	519
Martin <i>v.</i> Duncan, 156 Ill. 274.	120
Martin <i>v.</i> Martin, 174 Ill. 371.	213
Mason <i>v.</i> Park, 3 Scam. 532.	157
Massey <i>v.</i> Huntington, 118 Ill. 80.	252, 62
Maxwell <i>v.</i> People, 158 Ill. 248.	486
Mayer <i>v.</i> Brensinger, 180 Ill. 110.	459
McCauley <i>v.</i> Mahon, 174 Ill. 384.	385
McChesney <i>v.</i> City of Chicago, 171 Ill. 253.	193, 192, 191
McClellan <i>v.</i> Kellogg, 17 Ill. 498.	388
McCommon <i>v.</i> McCommon, 151 Ill. 428.	209
McDonald <i>v.</i> Starkey, 42 Ill. 442.	169
McHaney <i>v.</i> Trustees of Schools, 68 Ill. 140.	78
McIntire <i>v.</i> Yates, 104 Ill. 491.	457
McNulta <i>v.</i> Corn Belt Bank, 164 Ill. 427.	624, 49
Means <i>v.</i> Harrison, 114 Ill. 248.	78
Merritt <i>v.</i> City of Kewanee, 175 Ill. 537.	420
Metropolitan Bank <i>v.</i> Godfrey, 23 Ill. 579.	157
Metropolitan Nat. Bank of Chicago <i>v.</i> Jones, 137 Ill. 634.	233
Metropolitan West Side El. Ry. Co. <i>v.</i> Stickney, 150 Ill. 362.	246
Metropolitan West Side El. R. R. Co. <i>v.</i> White, 166 Ill. 375.	246
Meyer <i>v.</i> Butterbrodt, 146 Ill. 131.	152, 33, 32
Middleton <i>v.</i> Pritchard, 3 Scam. 510.	437

## PAGE.

Miltimore v. Ferry, 171 Ill. 219.....	356
Mineral Point R. R. Co. v. Keep, 22 Ill. 9.....	328
Moore v. Pickett, 62 Ill. 158.....	30
Moore v. Rogers, 19 Ill. 347.....	630
Morris v. Trustees of Schools, 15 Ill. 266.....	593
Morris v. Wibaux, 150 Ill. 627.....	600
Morton v. People, 47 Ill. 468.....	486
Moutray v. People, 162 Ill. 194.....	107, 106, 87
Mullanphy Savings Bank v. Schott, 135 Ill. 655.....	643
Munn v. Burch, 25 Ill. 21.....	283
Murphy v. City of Chicago, 29 Ill. 279.....	313, 297

## N

National Bank of America v. Indiana Banking Co. 114 Ill. 483..	282
Niagara Fire Ins. Co. v. Scammon, 100 Ill. 644.....	580
Niblack v. Park National Bank, 169 Ill. 517.....	284, 283
Nickerson v. Sheldon, 33 Ill. 372.....	393

## O

Offutt v. World's Columbian Exposition, 175 Ill. 472 .....	371
Ogle v. Koerner, 140 Ill. 170.....	559
Osgood v. Groseclose, 159 Ill. 511.....	34
Ottawa Northern Plank Road Co. v. Murray, 15 Ill. 336.....	46
Ottawa, Town of, v. County of LaSalle, 12 Ill. 339.....	525

## P

Paddon v. People's Ins. Co. 107 Ill. 196.....	32
Pardridge v. Morgenthau, 157 Ill. 395.....	164, 163
Palmer v. Woods, 149 Ill. 146.....	357, 356
Papineau v. Belgarde, 81 Ill. 61.....	332
Parker v. Parker, 61 Ill. 369.....	357
Patrick v. People, 132 Ill. 529.....	489
Patterson v. Johnson, 113 Ill. 559.....	253
Patterson v. Stewart, 104 Ill. 104.....	163
Peadro v. Carricker, 168 Ill. 570.....	389
Peak v. People, 71 Ill. 278.....	420
Pearce v. Foote, 113 Ill. 228.....	205, 204, 203
Pennsylvania Co. v. Conlan, 101 Ill. 93.....	330
Pennsylvania Co. v. Versten, 140 Ill. 637.....	118
People v. Brayton, 94 Ill. 341.....	525
People v. City of Peoria, 166 Ill. 517.....	179
People v. Chicago Gas Trust Co. 130 Ill. 268.....	42
People v. Cowden, 160 Ill. 557.....	527
People v. Drainage Comrs. 143 Ill. 417.....	181
People v. Drainage District, 155 Ill. 45.....	181
People v. Goodrich, 79 Ill. 148.....	105, 87
People v. Harper, 91 Ill. 357.....	275

## PAGE.

People <i>v.</i> Harrison, 82 Ill. 84.....	630
People <i>v.</i> Jones, 137 Ill. 35.....	181
People <i>v.</i> Klokke, 92 Ill. 134.....	337
People <i>v.</i> Moutray, 166 Ill. 630.....	107
People <i>v.</i> Nilson, 133 Ill. 565.....	453
People <i>v.</i> Palmer, 61 Ill. 255.....	105
People <i>v.</i> Peacock, 98 Ill. 172.....	78
People <i>v.</i> Pullman Palace Car Co. 175 Ill. 125.....	42
Perry County <i>v.</i> Jefferson County, 94 Ill. 214.....	453, 452
Petefish <i>v.</i> Becker, 176 Ill. 448.....	403
Peyton <i>v.</i> Village of Morgan Park, 172 Ill. 102.....	193, 191
Phares <i>v.</i> Barber, 61 Ill. 271.....	328
Phenix Ins. Co. <i>v.</i> LaPointe, 118 Ill. 384.....	118
Pierce <i>v.</i> Carleton, 12 Ill. 358.....	590
Pollard <i>v.</i> People, 69 Ill. 148.....	330
Pond <i>v.</i> Sheean, 132 Ill. 312.....	474, 473, 470
Pool <i>v.</i> Docker, 92 Ill. 501.....	618
Preachers' Aid Society <i>v.</i> England, 106 Ill. 125.....	252, 251
Probst Construction Co. <i>v.</i> Foley, 166 Ill. 31.....	459
Prout <i>v.</i> Lomer, 79 Ill. 331.....	190
Pullman Palace Car Co. <i>v.</i> Laack, 143 Ill. 242.....	119

## Q

Quinn <i>v.</i> Eagleston, 108 Ill. 248.....	539
--	-----

## R

Revell <i>v.</i> People, 177 Ill. 468.....	340
Ribordy <i>v.</i> Murray, 177 Ill. 134.....	380
Rigge <i>v.</i> Girard, 133 Ill. 619.....	543
Rigney <i>v.</i> City of Chicago, 102 Ill. 64.....	303
Ritchie <i>v.</i> People, 155 Ill. 98.....	80
Robb <i>v.</i> Smith, 3 Scam. 46.....	101, 93
Rock Island and Peoria Ry. Co. <i>v.</i> Leisy Brewing Co. 174 Ill. 547.	247
Rogers <i>v.</i> Miller, 4 Scam. 333.....	595
Rose <i>v.</i> Swann, 56 Ill. 37.....	640
Roth <i>v.</i> Michalis, 125 Ill. 325.....	62
Roth <i>v.</i> Roth, 104 Ill. 35.....	198
Roth <i>v.</i> Smith, 54 Ill. 431.....	328
Rowan <i>v.</i> Bowles, 25 Ill. 97.....	163
Roy <i>v.</i> Goings, 96 Ill. 361.....	455
Ryan <i>v.</i> Duncan, 88 Ill. 144.....	311
Ryan <i>v.</i> May, 14 Ill. 49.....	631

## S

Sarah <i>v.</i> Borders, 4 Scam. 341.....	79
Saur <i>v.</i> Ferris, 145 Ill. 115.....	642
Schintz <i>v.</i> People, 178 Ill. 320.....	575
Schoonover <i>v.</i> Myers, 28 Ill. 308.....	328
Scofield <i>v.</i> Tompkins, 95 Ill. 190.....	604, 601

Scott <i>v.</i> People, 141 Ill. 195.....	489
Seacord <i>v.</i> People, 121 Ill. 623.....	486
Seeberger <i>v.</i> McCormick, 178 Ill. 404.....	234
Selby <i>v.</i> Hutchinson, 4 Gilm. 319.....	332
Seligman <i>v.</i> Laubheimer, 58 Ill. 124.....	559
Sellers <i>v.</i> Greer, 172 Ill. 549.....	642
Seymour <i>v.</i> Belding, 83 Ill. 222.....	473
Shackelton <i>v.</i> Sebree, 86 Ill. 616.....	62
Shinkle <i>v.</i> McGill, 58 Ill. 422.....	143, 142
Sinsheimer <i>v.</i> Skinner Manf. Co. 165 Ill. 116.....	630
Skiles <i>v.</i> Switzer, 11 Ill. 533 .....	252
Skinner <i>v.</i> McDowell, 169 Ill. 365.....	519
Smith <i>v.</i> Bangs, 15 Ill. 399.....	312
Smith <i>v.</i> Heath, 102 Ill. 130.....	399
Smith <i>v.</i> Lyons, 80 Ill. 600 .....	131
Smith <i>v.</i> McDowell, 148 Ill. 51.....	307
Smith <i>v.</i> People, 142 Ill. 117.....	548
Snell <i>v.</i> Buresh, 123 Ill. 151.....	611
Snell <i>v.</i> City of Chicago, 133 Ill. 413 .....	453
Snydacker <i>v.</i> Blatchley, 177 Ill. 506.....	567
Snyder <i>v.</i> Partridge, 138 Ill. 173.....	644
Soby <i>v.</i> People, 134 Ill. 66.....	452
Springfield, City of, <i>v.</i> Green, 120 Ill. 269.....	147
Springer <i>v.</i> Bigford, 160 Ill. 495.....	121
Springer <i>v.</i> Kroeschell, 161 Ill. 358.....	458
Stack <i>v.</i> City of East St. Louis, 85 Ill. 377.....	307
Stearns <i>v.</i> Sweet, 78 Ill. 446 .....	619
St. Clair, County of, <i>v.</i> People, 85 Ill. 396.....	337
Stevison <i>v.</i> Earnest, 80 Ill. 513.....	163
Stickney <i>v.</i> Goudy, 132 Ill. 213.....	642
St. John <i>v.</i> Conger, 40 Ill. 535.....	643
St. Louis Stock Yards <i>v.</i> Wiggins Ferry Co. 102 Ill. 514.....	166
St. Louis Stock Yards <i>v.</i> Wiggins Ferry Co. 112 Ill. 384.....	166
Stout <i>v.</i> Cook, 41 Ill. 447.....	311
Stunz <i>v.</i> Stunz, 131 Ill. 210.....	263
Sutherland <i>v.</i> Sutherland, 69 Ill. 481.....	169
Sweet <i>v.</i> West Chicago Park Comrs. 177 Ill. 492.....	420

## T

Tamm <i>v.</i> Lavalle, 92 Ill. 263.....	641
Tarleton <i>v.</i> Vietes, 1 Gilm. 470 .....	134
Taylor <i>v.</i> Pegram, 151 Ill. 106.....	403
Telford <i>v.</i> Garrels, 132 Ill. 550.....	457
Thayer <i>v.</i> Allison, 109 Ill. 180.....	618
Thompson <i>v.</i> Hoagland, 65 Ill. 310.....	414, 413
Thompson <i>v.</i> People, 96 Ill. 158.....	489
Thorn <i>v.</i> West Chicago Park Comrs. 130 Ill. 594.....	144

Tink <i>v.</i> Walker, 148 Ill. 234.....	470
Titus <i>v.</i> Mabee, 25 Ill. 257.....	190
Toledo, Peoria and Warsaw Ry. Co. <i>v.</i> Conroy, 68 Ill. 560.....	20
Toledo, Wabash and Western Ry. Co. <i>v.</i> Ingraham, 77 Ill. 309.....	247
Trausch <i>v.</i> County of Cook, 147 Ill. 534.....	528
Trower <i>v.</i> Elder, 77 Ill. 452.....	603, 602
Truesdale <i>v.</i> Ford, 37 Ill. 210.....	388, 387
Trustees <i>v.</i> Bruner, 175 Ill. 307.....	152
Trustees of Commons <i>v.</i> McClure, 167 Ill. 23.....	437
Trustees of Schools <i>v.</i> Potter, 108 Ill. 433.....	395
Tucker <i>v.</i> Shaw, 158 Ill. 326.....	391
Tyson <i>v.</i> Postlethwaite, 13 Ill. 727.....	525

## U

Uhlich <i>v.</i> Muhlke, 61 Ill. 490 .....	25
Underwood <i>v.</i> Wolf, 131 Ill. 425.....	600
Union, County of, <i>v.</i> Ussery, 147 Ill. 204.....	528
Union Mutual Life Ins. Co. <i>v.</i> Campbell, 95 Ill. 267.....	254
Union Nat. Bank <i>v.</i> Oceana County Bank, 80 Ill. 212.....	283
United States Life Ins. Co. <i>v.</i> Vocke, 129 Ill. 557.....	329
United States Mortgage Co. <i>v.</i> Gross, 93 Ill. 483.....	78
United States Trust Co. <i>v.</i> Lee, 73 Ill. 142.....	42

## V

VanCloostere <i>v.</i> Logan, 149 Ill. 588.....	476
---	-----

## W

Wabash Ry. Co. <i>v.</i> Henks, 91 Ill. 406.....	326
Wabash, St. Louis and Pacific Ry. Co. <i>v.</i> McDougal, 113 Ill. 603.....	268
Walker <i>v.</i> Village of Morgan Park, 175 Ill. 570.....	191
Walker <i>v.</i> Walker, 42 Ill. 311.....	254
Walker <i>v.</i> Way, 170 Ill. 96.....	63
Wallahan <i>v.</i> Ingersoll, 117 Ill. 123.....	511
Wangelin <i>v.</i> Goe, 50 Ill. 459.....	377
Warner <i>v.</i> Campbell, 26 Ill. 282.....	619
Waterman <i>v.</i> Tuttle, 18 Ill. 292.....	420
Weaver <i>v.</i> Poyer, 70 Ill. 567.....	190
Weber <i>v.</i> Christen, 121 Ill. 91.....	254
Wells <i>v.</i> Hicks, 27 Ill. 343.....	143, 142
Wenona Coal Co. <i>v.</i> Holmquist, 152 Ill. 581.....	209
Wescott <i>v.</i> Wicks, 72 Ill. 524.....	198
Wessels <i>v.</i> Colebank, 174 Ill. 618 .....	379
West <i>v.</i> Fitz, 109 Ill. 425.....	251
West <i>v.</i> People, 137 Ill. 189.....	486
West Chicago Park Comrs. <i>v.</i> Farber, 171 Ill. 146.....	139, 137
White <i>v.</i> People, 94 Ill. 604.....	191
White <i>v.</i> Town of West Chicago, 164 Ill. 196.....	137

## PAGE.

Whitman v. Heneberry, 73 Ill. 109.....	538
Williams v. Baker, 67 Ill. 238.....	414
Williams v. People, 121 Ill. 84.....	110, 81
Williams v. Tatnall, 29 Ill. 553.....	644
Williams v. Williams, 148 Ill. 426.....	254
Wilson v. Genseal, 113 Ill. 403.....	328
Winkelman v. People, 50 Ill. 449.....	104
Winslow v. Cooper, 104 Ill. 235.....	166
Wisconsin Central R. R. Co. v. Wieczorek, 151 Ill. 579.....	135
Wood v. Thornly, 58 Ill. 464.....	474
Wood v. Whelen, 93 Ill. 153.....	424
Woolford v. Dow, 34 Ill. 424.....	619
Wunderle v. Wunderle, 144 Ill. 40.....	511

## Z

Zeigler v. Cox, 63 Ill. 48.....	592, 591
Zirngibl v. Calumet Dock Co. 157 Ill. 430.....	433

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